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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

R AND J MURRAY, LLC,
Petitioner,

v.

MURRAY COUNTY, GEORGIA;
JAMES WELCH, Sole Commissioner of Murray County;
TOM STARNES, Murray County Manager,
Respondents.

On Petition for Writ of Certiorari to the Georgia Supreme Court

PETITION FOR WRIT OF CERTIORARI

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March 12, 2008

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QUESTIONS PRESENTED

The Georgia Supreme Court has decided three important federal questions in a way that conflicts with relevant decisions of this Court.

1. Petitioner's proposed landfill is consistent with every provision of Murray County's solid waste management plan ("SWMP"). Nevertheless, Murray County wholly created an interpretation of its SWMP that allows it to determine that Petitioner's proposed landfill is inconsistent with Murray County's SWMP. Does Murray County violate the Due Process Clause if it relies upon vague and ambiguous provisions in its SWMP to refuse to provide a written verification that a proposed landfill is consistent with its SWMP?

2. Does Murray County violate the Due Process Clause when it deprives a party of its property rights without any evidence and without providing a hearing to the party?

3. Murray County collects a host fee from the private entity operator of its landfill only on waste collected at the landfill that is generated outside of Murray County. Murray County's interpretation of its SWMP prohibits the development of any other landfill in Murray County; thus, waste generated outside of Murray County cannot avoid the host fee. Does Murray County's interpretation of its SWMP violate the Commerce Clause?

RULE 29.6 STATEMENT

SRS Holding, LLC is a parent company of R and J Murray, LLC. No publicly held company owns 10% or more of R and J Murray, LLC's stock.

Southern Refuse Service Inc. is a parent company of SRS Holding, LLC. No publicly held company owns 10% or more of SRS Holding, LLC's stock.

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OPINIONS BELOW

The November 21, 2007 decision of the Georgia Supreme Court that gives rise to this petition can be found at R and J Murray, LLC v. Murray County, ___Ga. ___, ___ S.E.2d ___ (2007). A copy of the Decision is included as Appendix A. The Decision affirmed the Murray County Superior Court's Order Granting Defendants' Motion For Summary Judgment in favor of the Respondents. A copy of that Order is included as Appendix B. By Order dated December 13, 2007, the Georgia Supreme Court denied a motion for reconsideration. A copy of that Order is included as Appendix C.

JURISDICTION

On November 21, 2007, the Georgia Supreme Court entered the judgment sought to be reviewed. On December 13, 2007, the Georgia Supreme Court denied Petitioner's Motion for Reconsideration. Pursuant to Supreme Court Rule 13.1, this petition is filed within the time allowed by law.

Jurisdiction over the appeal is invoked pursuant to 28 U.S.C. §§ 1257(a), 2101(d).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED IN THE CASE

The Due Process Clause of the Fourteenth Amendment to the United States Constitution

Nor shall any State deprive any person of life, liberty, or property, without due process of law;

The Commerce Clause of the United States Constitution

The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes

Official Code of Georgia Annotated § 12-8-24(g)

(g) Prior to the issuance of any permit for a solid waste handling facility or the granting of any major modification of an existing solid waste handling permit, the director shall require written verification to be furnished by the applicant that the proposed facility complies with local zoning or land use ordinances, if any; and after July 1, 1992, that the proposed facility is consistent with the local, multijurisdictional, or regional solid waste management plan developed in accordance with standards promulgated pursuant to this part subject to the provisions of Code Section 12-8-31.1 and that the host jurisdiction and all jurisdictions generating solid waste destined for the applicants' facility can demonstrate that they are part of an approved solid waste plan developed in accordance with standards promulgated pursuant to this part and are actively involved in and have a strategy for meeting the statewide goal of waste reduction by July 1, 1996.

Solid Waste Management Plan 2000 Update for Murray County and cities of Chatsworth and Eton, June 2001, Revised February 2002

Pertinent text is set out in Appendix D.

STATEMENT OF THE CASE

R and J Murray, LLC ("R&J"), Petitioner, seeks to construct and develop a landfill in Murray County, Georgia, on a Site adjacent to the County Landfill and U.S. Highway 411. The Georgia Environmental Protection Division ("GEPD") has approved the Site and is ready to issue a permit to R&J to construct and develop R&J's Facility. However, before the GEPD can issue the permit to R&J, GEPD must receive written verification from Murray County that R&J's Facility is consistent with the SOLID WASTE MANAGEMENT PLAN 2000 UPDATE FOR MURRAY COUNTY AND CITIES OF CHATSWORTH AND ETON, JUNE 2001, REVISED FEBRUARY 2002 ("SWMP"). *See* OCGA § 12-8-24(g). This case arises out of Murray County's refusal to provide the consistency verification in violation of constitutional principles in its interpretation and application of the SWMP.

I. R&J SEEKS TO DEVELOP A LANDFILL IN MURRAY COUNTY.

In October of 2001, prior to locating the Site or beginning the permitting process, Mike Ayers, Managing Director of R&J, met with Murray County's Commissioner and County Manager. They discussed potential locations for landfills in Murray County. The County Manager suggested property close to the County Landfill. [R-461] Specifically, the County Manager told Ayers to look in the area of the Site. *Id.*

Ayers, the Commissioner, and the County Manager also discussed whether Murray County had any legal obstacles to developing a landfill. The Commissioner

and the County Manager provided Ayers with written verification that Murray County had no zoning or other land use ordinances that would prevent development of the Facility. [R-456; R-461; R-1809] Based upon those meetings and the written verification, Ayers located the Site and signed a contract to purchase the Site. [R-396-402]

Ayers, the Commissioner, and the County Manager also discussed how Ayers could assist Murray County with the County Landfill. In response to the County Manager's request to put the suggestions in writing [R-456-57], Ayers submitted a written proposal to Murray County proposing four options for the County Landfill. Each option involved accepting municipal solid waste ("MSW") at the County Landfill and at the Facility. [R-1726-27] Ayers also offered to lease the County Landfill while accepting MSW at the Facility. [R-1727-28]

On March 6, 2002, after numerous written communications between Ayers and the County officials about accepting MSW at the Facility, the Commissioner and County Manager provided a revised written verification to Ayers:

> The development and operation of a municipal solid waste landfill and a C and D landfill for the disposal of construction and demolition waste and carpet waste is an allowable use on the [Site]. The permitted landfill will be included in the County Solid Waste Plan.
>
> The land use designation as a landfill will also be provided for the above identified parcels

> when Murray County adopts future land use and zoning ordinances.

[R-1735] The underlined words were added to the prior written verification.

When Murray County issued the March 6, 2002 written verification, nobody thought that the Facility was inconsistent with the SWMP. To the contrary, everybody thought that the insertions in the March 6, 2002 written verification granted all of the necessary county approvals for the Facility.

The Commissioner confirmed that he thought that the March 6, 2002 written verification constituted a consistency verification. Specifically, the Commissioner admitted that the private landfill described in the March 6, 2002 written verification was "a viable function under the Solid Waste Management Plan." [R-443, 22:19-22] The Georgia Supreme Court also found that Murray County had told R&J that the Facility was consistent with the SWMP. *Murray County v R&J Murray*, 280 Ga. 314, 314, 627 S.E.2d 574, 576 (2006) ("*Murray County I*").

II. MURRAY COUNTY REVERSED ITS VERIFICATION OF THE FACILITY AFTER IT SIGNED A CONTRACT WITH SANTEK TO OPERATE THE COUNTY LANDFILL.

A. Murray County Signed an Agreement with Santek to Operate the County Landfill that Requires Santek to Pay a Host Fee to Murray County for Each Ton of Non-Murray County Waste that Santek Receives at the County Landfill.

On June 12, 2002, Murray County signed an Agreement with Santek Environmental of Georgia, LLC ("Santek") to operate the County Landfill. [R-91-123] Santek and the County agreed "to develop markets for Solid Waste to increase the anticipated volume to be received at the [County] Landfill." [R-100-01]

The Agreement created a host fee paid to Murray County for each ton of solid waste generated outside of Murray County which is disposed at the County Landfill. [R-1772] Thus, Murray County does not want R&J's Facility to reduce the flow of non-County waste to the County Landfill and thereby reduce the host fee the County receives. [R-1446-47] The Commissioner expressed his displeasure with the competition R&J's Facility would create by stating that the County Landfill and R&J's Facility would be like two gas stations competing across the street from each other. [R-441]

B. R&J Continued to Seek a Permit for the Facility, and Murray County and Santek Monitored R&J's Progress.

On July 3, 2003, R&J submitted its Permit Application, Site Acceptability Study, and the written verifications to the GEPD. [R-1817-23] On November 20, 2003, the Facility cleared the first of the two major permitting hurdles. The GEPD determined that the Facility complied with all siting standards, and the GEPD sent a Site Suitability Notice to R&J and Murray County. R-1784-88.

On December 10, 2003, R&J sent a Public Notice to the County Manager announcing that R&J received a Site Suitability Notice and that a public meeting would be held concerning the Facility. [R-1789-90] The very next day, the County Manager faxed the Public Notice and the March 6, 2002 written verification to Santek's Director of Corporate Development. [R-1791-94] The public meeting was held on December 29, 2003; no one complained about the Facility; and no Murray County official voiced any concerns to the public about the Facility. [R-1813-15] The GEPD asked R&J to submit an updated written verification in a form specified by the GEPD.

C. Subsequently, Murray County No Longer Felt That R&J's Facility Was Consistent with the SWMP.

On August 26, 2004, the County Attorney offered six "reasons" why the Facility was not consistent with the SWMP. [R-1799-1801] The trial court properly ignored the first five reasons. The sixth reason stated

that the Facility will violate and interfere with the Agreement thereby jeopardizing Santek's obligations to Murray County, including Santek's obligation to pay the host fee to the County for non-County waste. [R-1799-1801; 112-13] One week later, Santek's counsel sent a letter to R&J threatening R&J with litigation and punitive damages if R&J did not "immediately cease all tortuous [sic] interference with Santek's business relationship with Murray County." [R-1802-03]

III. R&J FILED THIS LITIGATION WHEN MURRAY COUNTY REFUSED TO PROVIDE R&J WITH THE WRITTEN VERIFICATION OR A HEARING.

R&J filed a PETITION FOR MANDAMUS. [R-4] Shortly thereafter, Murray County mentioned for the first time that the Facility might have environmental and land use impacts. [R-665] The trial court granted summary judgment to R&J, holding that Murray County was limited to evaluating the proposed facility's compliance with the environmental and land use factors set forth in the SWMP and that R&J's proposed facility was consistent with those factors. [R-1334-46] Murray County appealed this decision to the Georgia Supreme Court in *Murray I*.

In *Murray County I*, the Georgia Supreme Court held that Murray County was not limited to evaluating only environmental and land use factors, but could consider any relevant factor properly considered in the SWMP itself. *Murray County I*, 280 Ga. at 315 and 317, 627 S.E.2d at 576-77 and 578. The Georgia Supreme Court then remanded the matter to the trial

court to determine whether the County's refusal to issue a verification was based on a factor properly considered in the SWMP itself.

On remand, R&J filed an AMENDED PETITION FOR MANDAMUS AND OTHER EQUITABLE RELIEF to clarify some of its constitutional claims: (1) the SWMP is unconstitutionally vague as applied to the Facility; (2) the SWMP does not provide objective criteria to control Murray County's discretion or provide notice of the criteria for issuing the consistency verification; and (3) the SWMP and Murray County's actions violated the Commerce Clause of the United States Constitution. [R-1473-91] R&J objected to Murray County's failure to conduct a hearing or review evidence. [R AND J MURRAY, LLC'S RESPONSE TO DEFENDANTS' BRIEFS, R-1833-51] The trial court determined that Murray County based its refusal to provide the verification on financial and other factors, and the trial court granted summary judgment to the Respondents. [R-2256-2267]. R&J appealed this Order to the Georgia Supreme Court in *Murray County II*.

In *Murray County II*, R&J pointed out that the SWMP and Murray County's actions were unconstitutional for several reasons: (1) the SWMP was vague and ambiguous as applied to the Facility; (2) the SWMP failed to provide sufficient standards to control the discretion of the governing authority; (3) the SWMP failed to provide adequate notice to applicants of the criteria for issuance of a consistency verification; (4) Murray County deprived R&J of a vested property right without conducting a hearing or reviewing any evidence; (5) the SWMP and Murray County's actions constituted economic protectionism

and resource protectionism in violation of the Commerce Clause; (6) the SWMP and Murray County's action discriminated against interstate commerce; and (7) the burden imposed on commerce by the SWMP is clearly excessive in relation to the putative local benefits. [R AND J MURRAY, LLC'S BRIEF OF APPELLANT; R AND J MURRAY, LLC'S SUPPLEMENTAL BRIEF OF APPELLANT; R AND J MURRAY, LLC'S SECOND SUPPLEMENTAL BRIEF OF APPELLANT; App. A]

The Georgia Supreme Court upheld the trial court's determination that the County properly considered economic factors in the SWMP when it established a one-landfill strategy for its waste, and therefore, could use its one-landfill strategy as a basis to refuse to verify R&J's application for a permit. [App. A] This Petition for Writ of Certiorari followed.

LAW AND ARGUMENT

I. THE GEORGIA SUPREME COURT ERRED IN FAILING TO PROTECT R&J'S VESTED RIGHT TO A WRITTEN VERIFICATION.

An applicant for a proposed landfill has a vested right to a written verification if he is in compliance when he first requests written verification. *See Banks County v. Chambers of Georgia. Inc.*, 264 Ga. 421, 421, 444 S.E.2d 783, 785 (1994). On March 6, 2002, the County provided written verification to R&J that the Proposed Facility is consistent with the SWMP. Moreover, as set forth in the January 19, 2004 affidavit of Mike Ayers, R&J, in good faith, made a substantial change of position in relation to the Site, made substantial expenditures, and incurred

substantial obligations in reliance upon the County's written verification. At the very least, the March 6, 2002 written verification was an assurance from the County that future permits would probably issue; thus, R&J is entitled to a written verification of consistency. *See Recycle & Recover v. Ga. Bd. of Nat. Resources*, 266 Ga. 253, 255, 466 S.E.2d 197, 199 (1996); *WMM Properties, Inc. v. Cobb County*, 255 Ga. 436, 439, 339 S.E.2d 252, 255 (1986); *Barker v. County of Forsyth*, 248 Ga. 73, 76, 281 S.E.2d 549, 552 (1981).

II. THE GEORGIA SUPREME COURT ERRED IN ITS ANALYSIS OF R&J'S DUE PROCESS CLAIMS.

The Fourteenth Amendment's prohibition against depriving any person of life, liberty, or property, without due process of law is implicated in this case in at least two ways. First, R&J's due process rights were violated when R&J was deprived of its property rights without a hearing. Second, R&J's due process rights were violated when R&J was deprived of its property rights by application of a vague and ambiguous ordinance.

A. R&J's Due Process Rights Were Violated When R&J Was Deprived of Its Property Rights without a Hearing.

As set forth above, R&J clearly has protected property rights; indeed, the County admitted and the trial court acknowledged that the County cannot apply its August 5, 2003 zoning ordinance against R&J because of R&J's vested property rights. Georgia law

requires a hearing where one's property rights are involved. Thus, the County's failure to conduct a hearing violates R&J's due process rights.

As the Georgia Court of Appeals stated in *City of Hawkinsville v. D. T. Clark*, 135 Ga.App. 875, 219 S.E.2 577, 579 (1975):

> The ordinance here is constitutionally defective for two reasons. One, it grants to the Board of Commissioners of the City the arbitrary authority to grant a permit to some and to refuse others. It prescribes no rule or guide by which it may be impartially executed and which will preclude partiallity. Two, it does not grant an applicant for a permit an opportunity to be heard in support of his application. Both the Federal and the Georgia Constitutions require that all persons shall be treated alike and the exercise of arbitrary power is forbidden. *Dorsey v. City of Atlanta*, 216 Ga. 778, 781, 119 S.E.2d 553. Where one's property rights are involved due process of law requires a hearing as a matter of right. *Blocker v. Blackburn*, 228 Ga. 285, 185 S.E.2d 56. The ordinance is unconstitutional on its face.

Thus, there can be no doubt that the County violated R&J's right to due process when it refused to provide the written verification without conducting a hearing.

B. R&J's Due Process Rights Were Violated When R&J Was Deprived of Its Property Rights by Application of a Vague and Ambiguous Ordinance.

The County refused to issue the written verification of consistency to R&J because the County believed that the SWMP precludes competition with the County Landfill. Contrary to the County's belief, the Facility is consistent with the SWMP. Indeed, the one-landfill strategy suggested by the County merely indicates that the County intends to have one landfill to fulfill Murray County's waste disposal needs. In other words, the County determined that it would not be prudent to construct two or more landfills for Murray County's waste disposal needs. However, the provisions in the SWMP that Murray County relies upon for its one-landfill strategy do not limit the development of other landfills in Murray County. Moreover, a private landfill in Murray County will not increase Murray County's landfill construction and expansion costs, nor will a private landfill increase Murray County's operating costs. Indeed, Murray County no longer faces those costs because of its Agreement with Santek.

It would be generous to characterize the SWMP as vague and ambiguous as interpreted by the County. Contrary to the County's belief, the SWMP does not contain any provision precluding competition with the County Landfill. The SWMP does not limit the number of landfills that can be developed in Murray County. The SWMP does not prohibit the development of a private landfill in Murray County. The SWMP does not contain any provision prohibiting, limiting, or

controlling the flow of waste generated inside of Murray County to a private landfill in Murray County. The SWMP does not contain any provision prohibiting, limiting, or controlling the flow of waste generated outside of Murray County to a private landfill in Murray County. Indeed, the only limitations on the development of landfills in Murray County are geographic limitations on where a landfill can be developed. [App. E; R-1928]

Moreover, R&J's Facility does not create any competition for waste generated inside of Murray County. From the very beginning, R&J proposed a landfill that would not accept waste generated inside of Murray County unless Murray County requested R&J to do so. [R-1726] R&J's EPD Permit Application specifically states that waste generated inside of Murray County will not be accepted at the Proposed Facility unless requested by Murray County. [R-2009, R&J Permit Application, App. A] Thus, the Facility cannot compete with Santek and Murray County for waste generated inside of Murray County.

In addition, there is nothing to prevent the County from raising fees to cover any shortfall should one occur. Indeed, this Court has approved waste flow control measures only when they raise fees for citizens within the local jurisdiction that enacts the waste flow control measure. *See United Haulers Ass'n., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, ___ U.S. ___, 127 S.Ct. 1786 (2007).

Finally, there is no need for the County to read a prohibition against private landfills into the SWMP. The record shows that the stream of waste generated

inside of Murray County has been sufficient to fund County Landfill operations and provide a hefty profit to Santek.

1. The Georgia Supreme Court erred by allowing Murray County to refuse to provide the consistency verification in reliance on a vague and ambiguous ordinance, the SWMP.

The SWMP must provide "sufficient standards" to control the discretion of the governing authority and provide adequate notice to applicants of the criteria for issuance of a permit. *See Hill v Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); *Boyce Motor Lines v. United States*, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952); *Connally v. General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); *Arras v. Herrin*, 255 Ga. 11, 12, 334 S.E.2d 677, 679 (1985); *Levendis v. Cobb County*, 242 Ga. 592, 250 S.E.2d 460 (1978) (holding that ordinance must be "drawn with sufficient specificity to apprise an applicant of common intelligence of the standards which he should anticipate the governing body will consider")).[1] Thus,

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[1] *See also, Lithonia Asphalt Co. v. Hall County Planning Comm'n*, 258 Ga. 8, 9, 364 S.E.2d 860, 861 (1988) (holding that vague

the County was limited to considering factors that are explicit, ascertainable, and objective.

Absolute and uncontrolled discretion by governing authorities invites abuse; therefore, the exercise of discretion by local governments must be tempered with "ascertainable standards . . . by which an applicant can intelligently seek" authority to conduct business. *Id.*; *Arras*, 255 Ga. at 12, 334 S.E.2d at 679 (quoting *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964)). As the Court stated in *Arras*:

> The ordinance ... contained objective standards regarding the location of the business where the license is to be exercised, and it is without dispute that Arras met these objective standards. Instead of relying on these standards, the Board based its denial on [vague

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language was void because it contained insufficient "objective standards" and "guidelines" to meet the requirements of due process. 258 Ga. at 9, 364 S.E.2d at 861.; *see also*, *FSL Corp. v. Harrington*, 262 Ga. 725, 726, 425 S.E.2d 276 (1993); (holding that a landfill was entitled to a permit because ordinance lacked "ascertainable standards" upon which decision could be based); *Dinsmore Development Company, Inc. v. Cherokee County*, 260 Ga. 727, 729, 398 S.E.2d 539, 540 (1990) (holding that a landfill was entitled to a permit because ordinance was not drawn with sufficient specificity to apprise an applicant of common intelligence of the standards which he should anticipate the governing body will consider); *Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 266 Ga. 393, 401-02, 467 S.E.2d 875, 883 (1996) (holding that due process requires that an ordinance set "explicit standards," and is void for vagueness if its prohibitions are not clearly defined).

> language]. These words contain no standard to control the discretion of the Board and thereby deny due process.

255 Ga. at 12, 334 S.E.2d at 679.

In *McKee v. City of Geneva*, 280 Ga. 411, 627 S.E.2d 555 (2006), the city was prohibited from considering a provision to preclude solid waste handling facilities from areas merely identified as having "environmental or other significant development or land limitations." The city's solid waste management plan, "addressed solid waste handling facilities only in ***indefinite*** and ***vague*** terms of future 'GOALS.'" *Id.* at 412, 557 (emphasis added). The city could not rely on indefinite and vague provisions to identify unsuitable sites; rather, the Court specifically held: ***the city had to make those determinations within its solid waste management plan.*** *Id.* Thus, the County's discretion is similarly limited to determining whether the Proposed Facility is consistent with ***explicit***, ***ascertainable***, and ***objective*** factors expressly stated in the SWMP itself.

2. The Georgia Supreme Court erred by failing to limit Murray County to factors properly considered in the SWMP.

The trial court's Order identifies "financing of solid waste management" as a factor. [App. B; R-2264] However, the trial court never examined whether "financing of solid waste management" is properly considered in the SWMP itself as required by *Murray County I*. [App. B] Moreover, the Order never identifies

the specific SWMP provisions that create "financing of solid waste management" as a factor. *Id.*

The Georgia Supreme Court has repeatedly held that a county may not consider unwritten considerations as a basis for denying a land use authorization:

> [W]e find that a local government is authorized to consider any relevant factor in determining whether a proposed facility is consistent with its SWMP ***that it properly considered in the SWMP itself***.

Murray County I, 280 Ga. at 315, 627 S.E.2d at 576-77 (emphasis added);

> Thus, in determining whether a proposed facility is consistent with its SWMP, a local government is authorized to consider any relevant factor ***that it appropriately considered in the SWMP itself.***

Id., 280 Ga. at 317, 627 S.E.2d at 578 (emphasis added). *See also, Lithonia Asphalt Co. v. Hall County Planning Commission*, 258 Ga. 8, 9, 364 S.E.2d 860, 861 (1988); *Fulton County v. Bartenfeld*, 257 Ga. 766, 363 S.E.2d 555 (1988); *Crymes v. DeKalb County*, 258 Ga. 30, 364 S.E.2d 852 (1988).

Similarly, in *McKee v. City of Geneva*, 280 Ga. 411, 413, 627 S.E.2d 555, 558 (2006), the Georgia Supreme Court held that a city had to formally amend its solid waste management plan if the city wanted to consider determinations made after its solid waste management

plan was adopted. *Id.* at 413, 558. Thus, the city could not make determinations to identify unsuitable sites after the solid waste management plan was adopted, if those determinations were not included within a formal amendment to the plan. Rather, the Court specifically held that the city had to make those determinations within its solid waste management plan ***at the time the city adopted the plan or within a formal amendment to the plan.*** Id.

III. THE GEORGIA SUPREME COURT ERRED IN ITS ANALYSIS OF R&J'S COMMERCE CLAUSE CLAIMS.

The Commerce Clause prohibits the County from interpreting the SWMP to create a factor if that factor is discriminates against commerce on its face, in its purpose, or in its effect. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53, 97 S.Ct. 2434, 2446-47, 53 L.Ed.2d 383 (1977)).

In addition, the Commerce Clause prohibits the County engaging in economic protectionism. *See C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992). Similarly, the Commerce Clause prohibits the County engaging in resource protectionism. *See Oregon Waste Systems, Inc. v. Dep't of Environmental Quality*, 511 U.S. 93, 107, 114 S.Ct. 1345, 1354, 128 L.Ed.2d 13 (1994); *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). In

short, the Commerce Clause prohibits the County from interpreting its SWMP to require that all non-County waste flowing into the County must go to the County Landfill or to prohibit the development of a landfill competing for non-County waste if that interpretation is basically a protectionist measure and not directed to legitimate local concerns to safeguard the health and safety of its people with effects upon interstate commerce that are only incidental. For example, SWMP Map 4 is directed to legitimate local concerns to safeguard the health and safety of the County's citizens that are not protectionist measures; thus, Map 4's limitations do not violate the Commerce Clause.

Finally, the Commerce Clause prohibits the County from interpreting the SWMP even in a nondiscriminatory manner if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970).

In this case, the County's interpretation of the SWMP is in violation of the Commerce Clause for at least five reasons: (1) its purpose and effect discriminates against non-County waste, (2) it constitutes economic protectionism, (3) it constitutes resource protectionism, (4) it allows the County to veto importation of waste, and (5) it imposes a burden on commerce that is clearly excessive in relation to putative local benefits.

A. Murray County's Interpretation of the SWMP Violates the Commerce Clause Because It Discriminates Against Non-County Waste.

The Agreement with Santek creates a host fee for non-County waste received at the County Landfill. [R-1772] There is no similar fee for County waste received at the County Landfill. The County interprets the SWMP to prohibit the development of a landfill that will compete for non-County waste and thereby allow non-County citizens to avoid the host fee. Moreover, the lack of competition increases the waste disposal cost for persons outside of Murray County who dispose of waste inside Murray County because Santek can charge waste disposal fees based upon a monopoly for waste in the region. Thus, the County's interpretation of the SWMP violates the Commerce Clause because its purpose and effect discriminates against non-County waste. *See Oregon Waste Systems, Inc. v. Dep't of Environmental Quality*, 511 U.S. 93, 99, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13 (1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992).

B. Murray County's Interpretation of the SWMP Violates the Commerce Clause Because the County Attempts Economic Protectionism.

The Commerce Clause of the United States Constitution prohibits "***economic protectionism***" and economic discrimination by local jurisdictions. *See C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994); *Fort*

Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992); *Mullis Tree Service, Inc. v. Bibb County*, 822 F.Supp. 738, 748 (M.D.Ga.1993) (declaring county waste ordinance unconstitutional because it discriminated against non-county waste). Indeed, the central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism. *Carbone*, 511 U.S. at 390, 114 S.Ct. at 1682. As this Court noted in striking an ordinance under factually similar circumstances:

> The . . . ordinance does serve a central purpose that a nonprotectionist regulation would not: It ensures that the town-sponsored facility will be profitable, . . . In other words, as the most candid of amici and even Clarkstown admit, the flow control ordinance is a financing measure.

Carbone, 511 U.S. at 393, 114 S.Ct. at 1684.

1. The County's interpretation of SWMP constitutes the same kind of economic protectionism proscribed in *Carbone*.

Carbone controls this case. The County's interpretation of the SWMP requires all waste disposed on in the County to flow to the County Landfill. As in *Carbone*, the County's interpretation of SWMP drives up the cost for out-of-county interests to dispose of their solid waste. Not only are out-of-county interests subject to the host fee for disposal of their waste at the County Landfill, they also are subject to

Santek's power to price disposal costs at a locally non-competitive price. Out-of-county interests would not be subject to Santek's pricing premium if Santek was subject to competition from R&J's Facility. As in *Carbone*, these economic effects are more than enough to bring the County's interpretation of the SWMP within the purview of the Commerce Clause. It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow. *Carbone*, 511 U.S. at 389, 114 S.Ct. at 1681-82 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31, 57 S.Ct. 615, 621, 81 L.Ed. 893 (1937)),

Discrimination against interstate commerce is per se invalid, save in a narrow class of cases in which the local government can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). The County's only excuse for its interpretation of the SWMP is economic. As discussed in *Carbone*, the County has any number of nondiscriminatory alternatives, such as enacting uniform safety regulations enacted without the object to discriminate and subsidizing the County Landfill through general taxes or municipal bonds. *Carbone*, 511 U.S. at 393, 114 S.Ct. at 1683.

The County has an additional alternative not available at the time *Carbone* was decided. The County can charge monopolistic rates to dispose of waste generated within the County. If the County's citizens believe that their waste needs must be handled by Santek, they can raise their own fees to dispose of

County generated waste at the County Landfill if Santek's operations ever begin to be unprofitable.

2. The County's interpretation of the SWMP has the same kind of extra-territorial effect proscribed in *Carbone*.

The County is attempting to give extra-territorial effect to the SWMP. The County interprets the SWMP to grant Santek a waste disposal monopoly over County waste and ALL non-County waste that enters the County for disposal. Thus, the County's interpretation of the SWMP is similar to the ordinance struck down in *Carbone* in that the County's interpretation requires all waste to go to the County Landfill whether the waste was generated in the County or not. *See Carbone*, 511 U.S. at 389, 114 S.Ct. at 1681.

3. This case is distinguishable from *United Haulers* on the "salient difference" between *Carbone* and *United Haulers*.

In *United Haulers Ass'n., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, ___ U.S. ___, 127 S.Ct. 1786 (2007), this Court ruled that the ordinance at issue in *United Haulers* did not violate the Commerce Clause solely because the waste facility at issue was operated by a ***public*** entity. The majority's opinion stated that the only "salient difference" between *Carbone* (finding a Commerce Clause violation) and *United Haulers* (finding no Commerce Clause violation) is that the facility in *Carbone* was operated

by a private entity and the facility in *United Haulers* was operated by a public entity. *United Haulers*, 127 S.Ct. at 1790.

In this case, the County Landfill is operated by a ***private*** entity, Santek.[2] Moreover, Santek receives nearly all of the benefit of the County's interpretation of the SWMP precluding competition within the County. Santek receives all of the revenue, fees, charges, assessments, and other income of the County Landfill. [R-1771] The County's citizens receive free waste disposal, and the County receives the host fee for non-County waste. [R-1772]

Thus, the single deciding factor in the majority opinion in *United Haulers*, whether the entity operating the local jurisdiction's facility is public or private, dictates that the County's interpretation of the SWMP violates the Commerce Clause. The three dissenting Justices in *United Haulers*, Justices Alito, Stevens, and Kennedy, would have found a Commerce Clause violation regardless of whether the waste facility was public or private.

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[2] Even for a public entity, this Court stated that "revenue generation is not a local interest that can justify *discrimination* against interstate commerce." *Id.* at 1798 (quoting *Carbone*, 511 U.S. at 393, 114 S.Ct. 1677).

4. This case is distinguishable from *United Haulers* on the primary rationale for *United Haulers*.

In *United Haulers*, this Court noted that the most palpable harm imposed by the flow control ordinance[3] (more expensive trash removal) would fall upon the very people who voted for the laws:

> Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States, because when "the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-768, n. 2, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). Here, the citizens and businesses of the Counties bear the costs of the ordinances.

United Haulers, 127 S.Ct. at 1797. Thus, this Court found no reason to step in and hand the local

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[3] Flow control ordinance require locally generated waste to be collected and hauled by one entity. This "monopoly" allows the local jurisdiction to set a fee that will cover the local jurisdiction's waste management costs. For example, in *United Haulers*, the flow control laws allowed the local jurisdictions to charge a tipping fee of $86-per-ton, while out-of-state facilities charged between $37 and $55-per-ton, including transportation. *United Haulers*, ___ U.S. at ___, 127 S.Ct. at 1792.

businesses a victory they could not obtain through the political process. *Id.*

Unlike *United Haulers*, the County did not attempt to generate revenue by increasing the waste disposal fees paid by the County's citizens. Instead, the County generates revenue by minimizing competition in the region thereby compelling non-County citizens in the region to use the County Landfill. This is one of the evils that the Commerce Clause was meant to eliminate, particularly since the party that is truly reaping the profits is Santek, a private entity.

Thus, the County's interpretation of the SWMP causes exactly the opposite effect of the ordinance analyzed in *United Haulers*. The County's interpretation of the SWMP generates revenue by increasing fees to non-County citizens rather than increasing fees paid by County citizens. Thus, the burden of the County's interpretation of the SWMP cannot be alleviated by the operation of those political restraints normally exerted when interests within the state are affected; the costs of the County's interpretation of the SWMP are not borne by persons within the County. To the contrary, persons within the County do not bear any cost associated with the County's interpretation of the SWMP because they receive free waste disposal. [R-1772]

Moreover, the Agreement imposes a host fee solely on waste generated outside of the County. R&J's Facility would allow non-County residents to avoid the host fee and thereby reduce the subsidy available for County residents. Thus, the County refused to provide the written verification because it does not want to

reduce the revenue it receives from the host fee, and the County citizens have no interest in reversing that decision because it would not benefit them.

Thus, the primary rationale of *United Haulers* does not apply to this case.

C. Murray County's Interpretation of the SWMP Violates the Commerce Clause Because the County Attempts Resource Protectionism.

The Commerce Clause of the United States Constitution prohibits "***resource protectionism***" by local jurisdictions. *See Oregon Waste Systems, Inc. v. Dep't of Environmental Quality*, 511 U.S. 93, 107, 114 S.Ct. 1345, 1354, 128 L.Ed.2d 13 (1994) ("resource protectionism" by hoarding landfill space invalid); *Philadelphia v. New Jersey*, 437 U.S. 617, 629, 98 S.Ct. 2531, 2538, 57 L.Ed.2d 475 (1978) (out-of-state waste exclusion invalid); *Environmental Waste Reductions, Inc. v. Reheis*, 887 F.Supp. 1534, 1565 n.9 (N.D.Ga 1995) (holding that a portion of OCGA § 12-8-24(g) violates the Commerce Clause because it constitutes "resource protectionism").

The County attempts to use the SWMP for resource protectionism not allowed in this Court's Commerce Clause cases. Specifically, the County attempts to protect its land area resource by using its interpretation of the SWMP to prohibit other landfills from developing in the County. Brief of Appellees, pp. 6, 11 n.3, 13 n.4. Not one of this Court's cases allowed a local jurisdiction to prohibit other landfills within the local jurisdiction. Thus, the County's

interpretation of the SWMP violates the Commerce Clause.

D. Murray County's Interpretation of the SWMP Violates the Commerce Clause Because It Allows the County to Veto Importation of Waste.

The County's interpretation of the SWMP purports to give the County the authority to veto importation of waste. The County can simply refuse to accept non-County waste at the County Landfill.[4] Thus, the County's interpretation of the SWMP suffers from the same flaw as the law at issue in *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Nat. Resources*, 504 U.S. 353, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992) which erroneously gave a county the power to veto importation of solid waste. This Court stated that merely possessing such power violates the Commerce Clause; it is not necessary that the county exercise the power. *Fort Gratiot*, 504 U.S. at 363, 112 S.Ct. at 2025-26. As this Court held, a law violates the Commerce Clause if it attempts to give a county the authority to isolate itself from other local jurisdiction's waste issues. *Fort Gratiot*, 504 U.S. at 361, 112 S.Ct. at 2024). Like the law invalidated in *Fort Gratiot*, the County's interpretation of the SWMP gives the County

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[4] Without the County's One Landfill Factor, non-County waste producers would be able to nullify the County's veto by developing other landfills in the County which could be used for waste importation. The County would not be able to veto importation of waste to those landfills in the County.

the power to veto the importation of solid waste. This it cannot do.

E. Murray County's Interpretation of the SWMP Violates the Commerce Clause Because It Imposes a Burden on Commerce that Is Clearly Excessive in Relation to Putative Local Benefits.

As noted in the majority opinion in *Murray County II*, the financial inconsistency between R&J's Facility and the SWMP was entirely speculative: "development of an additional landfill in the county ***might*** render the existing landfill financially unable to continue operations." [App. A at 3a (emphasis added)] There was no evidence concerning: (1) the amount of waste that currently goes to the County Landfill from inside ***or*** outside of the County, (2) the amount of waste that Santek needs to receive at the County Landfill to continue operations at a profit, (3) the amount of waste that might be diverted from the County Landfill to R&J's Facility, (4) the extent to which R&J's Facility might impact County Landfill operations, or (5) why Murray County could not generate funds by raising fees on waste generated inside of Murray County disposed of at the County Landfill. Moreover, the record shows that Santek made a substantial profit operating the County Landfill. [R-2022-26; 2345; Ayers Depo. 316:18-318:2]

In addition, the sole putative benefit accepted by the Georgia Supreme Court in *Murray County II* is a financial benefit. There was no evidence offered on other issues: (1) that waste generated outside of

Murray County necessitated the host fee; (2) that private facilities, or specifically R&J's Facility, were any different than the County Landfill; and (3) that federal, state, and local laws were insufficient to regulate private landfills or R&J's Landfill.

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970), this Court held that a ***nondiscriminatory*** statute can be stricken for violating the Commerce Clause if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." As set forth above and in the record, the burden imposed by Murray County's interpretation of the SWMP are clearly excessive in relation to the putative benefits alleged by Murray County.

CONCLUSION

For the above stated reasons, the decision of the Georgia Supreme Court must be reversed for many reasons. It allows local governments to act arbitrarily, and worse, in contradiction of their own ordinances. It allows local governments to act in contradiction of the notice given by its ordinances.

The decision of the Georgia Supreme Court allows local governments to grant monopolies to favored companies without regard to the local government's own ordinances. It allows local governments to preclude competition within its jurisdiction for commerce generated outside of its jurisdiction. It allows provincial governments to force other jurisdictions to expend funds for their own local needs even if those needs can be met more rationally,

economically, and commercially within the provincial government's jurisdiction.

This Court should reverse the decision of the Georgia Supreme Court.

This 12th day of March, 2008.

Respectfully submitted by,

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APPENDIX

APPENDIX A

Supreme Court of Georgia

No. S07A0833

[Filed November 21, 2007]

R AND J MURRAY, LLC)
)
v.)
)
MURRAY COUNTY et al.)
)

Benham, Justice.

This appeal is the second appellate appearance of litigation in which R and J Murray, LLC (hereinafter R & J) seeks a writ of mandamus requiring verification from Murray County that a proposed landfill is consistent with the county's Solid Waste Management Plan (SWMP).[1] In the first appellate appearance of

[1] In order to obtain from the Department of Natural Resources a permit for the construction and operation of a landfill, the applicant for the permit must provide, among other items, a letter from the jurisdiction in which the landfill would be sited verifying the consistency of the proposed facility with the jurisdiction's SWMP. OCGA § 12-8-24(g). For a discussion of the consistency verification process generally and how it applies to the present

this litigation, *Murray County v. R & J Murray, LLC*, 280 Ga. 314, 627 S.E.2d 574 (2006) (hereinafter *Murray County*), this Court reversed the grant of summary judgment in favor of R & J because the trial court, in reliance on *Butts County v. Pine Ridge Recycling, Inc.*, 213 Ga. App. 510, 445 S.E.2d 294 (1994), had limited the county to consideration of only environmental and land use factors in determining whether a proposed facility was consistent with the SWMP. Overruling *Butts County*, we ruled that "in its determination of a proposed facility's consistency with its SWMP[,] ... a local government is authorized to consider any relevant factor that it properly considered in developing its SWMP, as defined by the statutory and regulatory scheme." *Murray County*, supra, 280 Ga. at 318, 627 S.E.2d 574. On remand from that decision, the trial court granted summary judgment to Murray County, concluding its denial of verification of R & J's proposal was supported by evidence regarding relevant factors properly considered in developing Murray County's SWMP and was, therefore, not an abuse of discretion such as would support the grant of mandamus relief.[2] This appeal is from that judgment.

1. R & J's first assertion on appeal, that it is entitled to the verification it seeks because denial of

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case, see *Murray County v. R & J Murray, LLC*, 280 Ga. 314, 627 S.E.2d 574 (2006).

[2] "Mandamus is an extraordinary remedy and is available against a public official only when the petitioner shows a clear legal right to the relief sought or a gross abuse of discretion." *Mid-Georgia Environmental Mgmt. Group v. Meriwether County*, 277 Ga. 670, 672-673, 594 S.E.2d 344 (2004).

verification burdens a vested property right, is based on R & J's claim the proposed facility was verified in 2002 as consistent with the SWMP. The record shows, however, the purported verification was a letter which did not comply with the requirements for a letter of verification set forth in Georgia Department of Natural Resources Rule 391-3-4-.02(10). In addition to containing no verification of the consistency of the proposed facility with the SWMP, the letter on which R & J relies did not demonstrate, as the rule requires, that Murray County is actively involved in and has a strategy for meeting the State-wide goal of waste reduction. Accordingly, R & J's argument on this issue, being without support in the record, has no merit.

2. One of the six items listed by Murray County in informing R & J the proposed landfill was inconsistent with the county's SWMP was that the SWMP sets forth a disposal strategy for Murray County and the cities of Chatsworth and Eton based on using the single existing landfill and expansions thereof until at least the year 2030. In granting summary judgment, the trial court pointed to evidence in the record establishing that the one-landfill strategy was based in part on the costs associated with the siting, design, construction, operation, closure, and post-closure maintenance of the landfill; that those costs are interrelated with the costs of collection and waste reduction; that the financing necessary to meet those costs is dependent on having a waste stream sufficient to generate the necessary revenue; and that development of an additional landfill in the county might render the existing landfill financially unable to continue operations. The trial court noted that the sustainability of a landfill is related to the protection,

health, and safety of persons and furthers the purposes of the Solid Waste Management Act (OCGA § 12-8-20 et seq.), and that the financing of solid waste management was a factor included in Murray County's SWMP. Based on this Court's holding in *Murray County* that those were proper factors to be considered in a consistency determination, the trial court held that Murray County had not committed an abuse of discretion in finding R & J's proposed facility inconsistent with Murray County's SWMP.

In *Murray County,* this Court held that applicable regulations required the county to consider in its consistency determination "the anticipated impact the proposed facility will have upon current solid waste management facilities," and recognized Murray County had done so in this case. Thus, the trial court was correct in its application on remand of our holding in *Murray County.* Our review of the record shows the trial court was also correct in its holding that evidence of record supports the conclusions regarding the one-landfill strategy set out above.

R & J contends the regulations requiring consideration of the anticipated impact the proposed facility will have upon current solid waste management facilities do not apply to the present case because Murray County's SWMP was adopted prior to the promulgation of the regulation requiring that factor be considered in determining consistency. R & J is correct that Murray County's SWMP was adopted under the 1994 "Minimum Planning Standards" and that the rule to which this Court made reference in *Murray Count,* Ga. Comp. R. & Regs. r. 110-4-3-.04(5)(d)(3), was adopted in 2003, but we cannot agree

with R & J's argument that the county is limited in its consistency determination to the factors listed in the former rule. The holding there was that "in determining whether a proposed facility is consistent with its SWMP, a local government is authorized to consider any relevant factor that it appropriately considered in the SWMP itself." *Murray County,* supra, at 317, 627 S.E.2d 574. Since factors related to the financial support of the Murray County landfill were considered in the SWMP, they were properly considered in making the determination that R & J's proposed facility would be inconsistent with the SWMP.[3]

Finally, R & J contends the trial court should have found that Murray County's determination that R & J's proposed facility is inconsistent with the SWMP was based on economic protectionism, citing this Court's holding in *Murray County,* supra, at 318, that

> nothing in the regulatory or statutory scheme authorizes local governments to develop a SWMP or deny certification for a proposed facility based on the desire by the local government to monopolize the waste management business. Because that kind of bare economic protectionism does not further the goals of the Act, it is not a proper basis for denying certification or developing a SWMP. R

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[3] Because the issue is not presented in this case, we express no opinion on the propriety of using in a consistency determination factors set out in the current rules but not included in a SWMP predating the current rules.

> & J argues that the County denied its certification in this case solely for this reason, but the trial court has never made that factual determination ....

The trial court has now ruled on that issue, rejecting R & J's argument that construing the SWMP to exclude new landfills from Murray County constituted economic protectionism violative of the Commerce Clause of the United States Constitution. We agree with the trial court's conclusion. As the U.S. Supreme Court noted in upholding a law favoring government-owned waste disposal facilities, "[l]aws favoring local government ... may be directed toward any number of legitimate goals unrelated to protectionism." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority,* --- U.S. ----, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007). Here, the provision in the SWMP for a one-landfill strategy, though based on economic considerations, is established in the record as being directed toward legitimate goals unrelated to protectionism. Contrary to R & J's arguments, there is no evidence of record suggesting that adoption of the one-landfill strategy was motivated by a desire to monopolize the waste management business.

The evidence of record supports Murray County's determination that R & J's proposed facility is inconsistent with the one-landfill strategy set out in the SWMP, and the factors leading to that determination were properly considered in the SWMP. Thus, the standard established in *Murray County* was

met with regard to that determination.[4] Accordingly, we conclude the trial court was correct in holding no abuse of discretion by Murray County was shown, and in awarding summary judgment to Murray County.

Judgment affirmed. All the Justices concur, except MELTON, J., who concurs specially.

MELTON, Justice, concurring specially.

In determining whether a proposed solid-waste facility is consistent with its Solid Waste Management Plan (SWMP), a local government is authorized to consider any relevant factor that it appropriately considered in its SWMP. *Murray County v. R & J Murray, LLC*, 280 Ga. 314, 315, 627 S.E.2d 574 (2006). The economic effect of a new facility on a local government's profits from its own pre-existent facility, however, is not such a relevant factor. Under the Georgia Comprehensive Solid Waste Management Act (Act), relevant factors should be those which impede or advance the Act's explicitly stated goals–protection of public health, safety, or well-being and the quality of the environment. In this case, Murray County abused its discretion to the extent that it based its determination that R & J Murray's proposed landfill was inconsistent with the SWMP simply because it would create economic competition for the County's pre-existing landfill. On the other hand, Murray

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[4] Since that one determination establishes the inconsistency of the proposed facility with Murray County's SWMP, we need not consider the correctness of the others bases for the determination of inconsistency.

County also properly considered the negative environmental impact the proposed landfill would have on Murray County's highways and wetlands. Because Murray County's decision to reject R & J Murray's proposal was not wholly based on economic protectionism, I concur in the judgment of the majority.

The Act was passed specifically for three purposes: (1) to protect the "health, safety, and well-being" of Georgia citizens; (2) to protect the quality of Georgia's environment; and (3) to create a "comprehensive state-wide program for solid waste management." OCGA § 12-8-21(a). The comprehensive state-wide program, in turn, has three stated purposes of its own: (1) to assure that all solid-waste does not "adversely affect the health, safety, and well-being of the public;" (2) to assure solid-waste facilities do not denigrate the "quality of the environment by reason of their location, design, method of operation, or other means;" and (3) to assure, "to the extent practical and feasible," maximum utilization is made of the resources contained in solid waste. *Id.* In other words, the purpose of the comprehensive state-wide program is to assure the goals of the Act–protection of public health and the environment.

In order to further these same goals at the local level, the Legislature required the creation of individual solid waste management plans throughout Georgia localities. OCGA § 12-8-31.1(a). "The legislature has provided that solid waste management planning by the State, local governments, and Regional Development Centers within the State is necessary to prevent environmental degradation, to

manage resources, and to effectively reduce and manage solid waste for the State and its residents." DCA Rule 110-4-3-.01(3). At a minimum, each local plan must: (1) assure "adequate solid waste handling and capability and capacity within the planning area for at least ten years;" (2) "enumerate the solid waste facilities as to size and type;" and (3) "identify those sites which are not suitable for solid waste handling facilities based on environmental and land use factors." By requiring localities to identify the needed capacity of solid waste handling, the type of facilities in existence, and suitable areas for future solid waste facilities, the Legislature advanced the goals of the Act by forcing localities to currently plan for future waste management needs.

Because local plans are inextricably tied to the Act as the mechanism by which the Act is essentially set into motion, the creation, implementation, and enforcement of such plans must be considered in light of the explicit purposes underlying the Act, namely protection of public health from the accumulation of solid waste and the preservation of the quality of the environment from the effects of solid waste facilities. A local plan should be enforced in a manner to foster these goals, as they form the reason that the local plans were required in the first place.[5] The directive of

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[5] Indeed, both the Environmental Protection Division and the Department of Community Affairs, the governmental bodies charged with overseeing the implementation of the Act, are charged with the responsibility to "protect the health, safety, and well-being of [Georgia's] citizens and to protect and enhance the quality of [Georgia's] environment." DCA Rule 110-4-3-.03(2), (3).

OPPOSITION BRIEF

90

No. 07-1170

FILED
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

R AND J MURRAY, LLC,

Petitioner,

v.

MURRAY COUNTY, GEORGIA; JAMES WELCH,
Sole Commissioner of Murray County;
TOM STARNES, Murray County Manager,

Respondents.

On Petition For Writ Of Certiorari
To The Georgia Supreme Court

BRIEF IN OPPOSITION

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RESTATED QUESTIONS PRESENTED

1. Whether Murray County, Georgia is prohibited by the Due Process clause of the U.S. Constitution from exercising the discretion conferred upon it by state law to determine that Petitioner's proposed solid waste landfill was not consistent with the county's solid waste management plan.

2. Whether Murray County, Georgia is prohibited by the dormant Commerce clause of the U.S. Constitution from exercising the discretion conferred upon it by state law to determine that Petitioner's proposed solid waste landfill was not consistent with the county's solid waste management plan.

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The opinion of the Supreme Court of Georgia in *R and J Murray, LLC v. Murray County, et al.*, (Pet. App. 1a-11a) is reported at 282 Ga. 740, 653 S.E.2d 720 (2007) ("*Murray County II*"). The Order of the Murray County Superior Court granting Defendants' Motion For Summary Judgment, dated October 16, 2006 ("Order"), is found at Pet. App. 12a-36a. The opinion of the Supreme Court of Georgia in *Murray County v. R & J Murray, LLC*, is reported at 280 Ga. 314, 627 S.E.2d 574 (2006) ("*Murray County I*"). A copy of that opinion is included as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked by Petitioner pursuant to 28 U.S.C. §§ 1257(a), 2101(d).

INVOLVED STATUTES AND REGULATIONS

U.S. CONST. amend. XIV § 1

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

The Official Code of Georgia Annotated § 12-8-24(g)

Pertinent text is set forth in Pet. 2.

Official Code of Georgia Annotated § 12-8-25.4(b)(2)

Pertinent text is set forth in Appendix B.

The Official Code of Georgia Annotated § 12-8-31.1

Pertinent text is set forth in Appendix C.

Rules of Georgia Department of Community Affairs Ga. Comp. R. and Regs. r. 110-4-3-.03(4)(c)

Pertinent text is set forth in Appendix D.

Rules of Georgia Department of Community Affairs Ga. Comp. R. and Regs. r. 110-4-3-.04(5)(d)(3)

Pertinent text is set forth in Appendix E.

Georgia Department of Natural Resources Ga. Comp. R. and Regs. r. 391-3-4-.02(10)

Pertinent text is set forth in Appendix F.

STATEMENT

Petitioner presents no "compelling reasons" for this Court to grant the Petition for Writ of Certiorari ("Petition"). SUP. CT. R. 10. Specifically, Petitioner fails to show that the Supreme Court of Georgia has decided any important federal question in a way that conflicts with a relevant decision of this Court. *See*

SUP. CT. R. 10(c). There being no conflict, the Petition should be denied.

I. Facts.

Petitioner seeks review by this Court of a decision of the Supreme Court of Georgia interpreting Georgia law under the Georgia Comprehensive Solid Waste Management Act, O.C.G.A. § 12-8-20 *et seq.*, ("Act"), and state regulations involving solid waste plan development, plan implementation and consistency determinations for proposed solid waste facilities. As described in the factual findings as set forth in the Order granting Defendants' Motion for Summary Judgment, Petitioner seeks a permit from the director of the Georgia Department of Natural Resources, Environmental Protection Division ("EPD") to operate a solid waste landfill for the disposal of both municipal solid waste ("MSW") and construction and demolition waste ("C&D") in Murray, County, Georgia (the "Proposed Landfill"). (Pet. App. 13a). Among the prerequisites to the issuance of a permit under Georgia law is verification by the "host jurisdiction" that a proposed landfill is consistent with the local solid waste management plan ("SWMP"). O.C.G.A. § 12-8-24(g); (Pet. App. 13a). Reflecting the importance of local government's participation in the arena of solid waste handling and disposal, that requirement is repeated in another subsection of the Act at O.C.G.A. § 12-8-31.1(e), providing that "[a]fter July 1, 1992, no permit . . . shall be issued for any municipal solid waste disposal facility . . . in a county

or region which is not consistent with a local, multi-jurisdictional, or regional solid waste management plan."

In its opinion on the first appellate appearance of this litigation before the Georgia Supreme Court in *Murray County I*, that court succinctly set forth the underlying facts of this case in regard to Petitioner's proposed landfill:

> In 2002, R&J first proposed building a Construction and Demolition ("C&D") landfill on 398 acres it owned in Murray County. Under O.C.G.A. § 12-8-24(g), before R&J could obtain a permit to build and operate a landfill from the EPD, it first had to obtain written verification from the County that its proposed landfill did not violate any zoning or land use ordinances and was consistent with the County's SWMP. The County responded to R&J's initial proposal, by letter, stating that the proposed C&D landfill, which would be restricted to the disposal of construction and demolition waste, was consistent with its zoning ordinances and its SWMP. R&J amended its request multiple times, however, and eventually asked the County to verify that an unrestricted Municipal Solid Waste ("MSW") landfill was also consistent with the County's SWMP.
>
> The County refused to verify that the proposed MSW landfill was consistent with its SWMP, claiming that an unrestricted MSW landfill would cause more environmental harm than the originally proposed C&D

> landfill, and that the proposed landfill, owing to economic factors as well as its geographic proximity to the County's existing landfill, would render the County unable to continue operating its existing landfill ["County Landfill"]. Due to land and geological limitations, the County's SWMP states that the County will rely exclusively on its existing MSW landfill until at least 2030. The County found that the proposed landfill would interfere with the expansion of the existing landfill necessary to achieve that goal, due to statutory restrictions on landfill density. In addition, the County concluded that the proposed landfill would render the County financially unable to continue operating its existing landfill, contrary to the SWMP, and that by increasing the waste stream into the County, the County would be unable to meet its waste reduction goals. The County thus concluded that the proposed MSW landfill was inconsistent with its SWMP, and it refused to issue the required verification to the EPD.

280 Ga. at 314-15, 627 S.E.2d at 575-76; (App. 1-3) (*see also* R-1127; R-1128; R-1130-31; R-1134; R-1198-1201; R-1206-07; R-1735; R-1211-13; R-1133; R-1195; R-1188-89; R-1142; R-1219-59; O.C.G.A. § 12-8-25.4(b)(2); R-1137; R-1561-64; R-1261; R-1191, pp. 67-68; R-1215-17; R-1194; R-575-92).[1] The *Murray*

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[1] Although Petitioner seeks a permit to operate the Proposed Landfill, it became clear on remand to the Superior Court from *Murray County I* that the original landfill proposal, and

(Continued on following page)

County I Court also noted that the "County also found that the unrestricted MSW landfill would create numerous environmental effects, including the spread of foul odors from trucks transporting sewage sludge through the most populated portions of the County." *Id.*, 280 Ga. at 315, n.3; (App. 3).

II. Relevant Proceedings Below.

A. *Murray County I.*

In *Murray County I*, the Georgia Supreme Court held under Georgia law that the County properly considered relevant factors in its determination that Petitioner's Proposed Landfill was inconsistent with Murray County's SWMP. *Murray County I*, 280 Ga. at

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several other proposals over time, were made by an entirely separate entity, SRS, Incorporated (R-1126-27 pp. 49-50; R-1128 pp. 59-60; R-1130-31 pp.101-05; R-1132-33; R-1809-11), and that Petitioner has never *owned* the site where Petitioner proposes to build and operate the Proposed Landfill (the "Subject Property"). (*See* R-401, land purchase contract between SRS, Inc., as "Buyer" and property owners). Although Petitioner states that it "signed a contract to purchase the Site," citing to R-396-402, the "Buyer" in the contract is not Petitioner, but a company called "SRS, Inc." (R-401). Indeed, Petitioner did not even come into existence until 2003, after the date upon which Petitioner claims that it received a "revised written verification." (*Compare* R-1673, ¶ 5 *with* Pet. 4). Petitioner has never held title to the Subject Property and has never closed on a purchase of same. (R-1700-02; R-210-35; R-1695-99). As Petitioner does not own and has never owned the Subject Property, the Supreme Court of Georgia in *Murray County II* properly affirmed the trial court's rejection of Petitioner's Constitutional arguments.

315. Finding that the state statutory and regulatory scheme "clearly reveals that local governments are authorized, and indeed required, to consider factors other than environmental and land use factors in developing a SWMP," the court observed: " '[a]t a minimum,' and among other things, the procedure for determining consistency 'shall address . . . (ii) the anticipated impact the proposed facility will have upon current solid waste management facilities, [and] (iii) the anticipated impact the proposed facility will have on collection and disposal capability within the planning area.'" *Id.*, 280 Ga. at 317; (App. 7). (citing Ga. Comp. R. and Regs. r. 110-4-3-.04(5)(d)(3)). Applying the foregoing considerations to the case presented, the *Murray County I* Court observed, "[t]he County in this case focused on precisely these factors, among others, when it determined that the proposed landfill would render the County unable to continue to operate the existing landfill, as envisioned by its SWMP." *Id.*, 280 Ga. at 317; (App. 7). The Georgia Supreme Court held, "thus, in determining whether a proposed facility is consistent with its SWMP, a local government is authorized to consider any relevant factor in determining whether a proposed facility is consistent with its SWMP that it appropriately considered in the SWMP itself." *Id.*; (App. 8).

Addressing Petitioner's argument that Respondents improperly denied certification of SWMP consistency solely for what it argued were unconstitutionally improper purposes, the *Murray County I* Court reasoned and held:

> We do note, however, that local governments are not authorized to consider factors that do not promote the "health, safety, and well-being" of their citizens, protect the quality of the environment, or otherwise further the purposes of the Georgia Comprehensive Solid Waste Management Act. For example, nothing in the regulatory or statutory scheme authorizes local governments to develop a SWMP or deny certification for a proposed facility based on the desire by the local government to monopolize the waste management business. Because that kind of bare economic protectionism does not further the goals of the Act, it is not a proper basis for denying certification or developing a SWMP. R&J argues that the County denied its certification in this case solely for this reason, but the trial court has never made that factual determination, and it would be improper for this Court to do so on appeal.

Id., 280 Ga. at 318; (App. 8-9). The Supreme Court of Georgia then remanded the case to the Superior Court of Murray County "for proceedings consistent with" its opinion. *Id.*; (App. 9).

B. The Order.

On remand, the Superior Court of Murray County carefully implemented the *Murray County I* Court's holding that the Respondents were authorized in their consistency determination to consider any relevant factor that it properly considered in

developing its SWMP. (Pet. App. 20a). Under this directive, the trial court found ample evidence sufficient to support the County's exercise of discretion under the Georgia statute. (Pet. App. 27a-31a). Such evidence of inconsistency with the SWMP included (1) the anticipated adverse impact the Proposed Facility would have upon both current solid waste management facilities and the collection and disposal capability within the planning area, (2) adverse impacts on financing of solid waste management for the county as envisioned by the SWMP, (3) negative land use effects of the Proposed Landfill such as the use of major highways in the vicinity of the proposed landfill site, and (4) negative environmental effects stemming from the Proposed Landfill such as the filling of wetlands, all of which were inconsistent with the County's SWMP. *Id.* In light of the abundance of evidence of record, the trial court concluded "that each aforementioned piece of evidence, standing alone, independently satisfies the 'any evidence' standard of review applied with appraising whether a gross abuse of discretion has occurred. Given the lack of an abuse of discretion, [Petitioner] is not entitled to a writ of mandamus and summary judgment in favor of [Respondents] is appropriate." (Pet. App. 31a).

Rejecting Petitioner's argument that Respondents' refusal to verify SWMP consistency amounted to a violation of the dormant Commerce Clause of the U.S. Constitution, the trial court noted that "[Petitioner's] lack of analysis and application of the holdings of these cases make it difficult for this Court to

consider whether [Petitioner] is serious in raising such claims. Nonetheless, the Court feels that [Petitioner's] Commerce Clause claim must be addressed." (Pet. App. 32a). In so doing, the trial court rejected Petitioner's argument under the Commerce Clause, that "'if Murray County can construe the SWMP to exclude landfills from Murray County, the SWMP violates constitutional principles,'" finding that "[Petitioner's] argument is tantamount to a rule of law whereby no local government may refuse to certify consistency for *any reason*, as such refusal would exclude a landfill from the jurisdiction and would thus be unconstitutional." (Pet. App. 32a-33a) (emphasis in original).

Addressing Petitioner's assertion that the County's SWMP and the lack of a hearing prior to Respondents' refusal to certify SWMP consistency violated Petitioner's due process rights, the Superior Court was even more candid, noting:

> In making such a claim, [Petitioner] briefly cites cases dealing with the validity of statutes and ordinances. [Petitioner's] brief, however, lacks any meaningful analysis and application of these cases to the facts of the instant case. A claim of a violation of constitutional due process is of a notably heavy weight. Georgia courts have steadily held that vague and indefinite attacks cannot be considered when dealing with constitutional matters. . . . As such, [Petitioner] has failed to show a violation of due process and

> summary judgment in favor of [Respondents] is appropriate.

(Pet. App. 35a). (Georgia state law citations omitted).

C. *Murray County II.*

Petitioner appealed to the Supreme Court of Georgia, and the court affirmed. *Murray County II*, 282 Ga. at 743; (Pet. App. 7a). The court first addressed Petitioner's argument that it is entitled to a SWMP consistency verification because "denial of verification burdens a vested property right." *Id.*, 282 Ga. at 741; (Pet. App. 3a). In rejecting this argument, the court noted that it was premised on Petitioner's claim that its Proposed Landfill was already verified in 2002 as consistent with the SWMP. *Id.* Finding that Petitioner's argument was "without support in the record," the court held it had "no merit." *Id.* Next, the Supreme Court of Georgia examined whether the trial court on remand properly applied its earlier holding in *Murray County I* in regard to SWMP consistency determinations under the Act and applicable Georgia state regulations. *Id.*, 282 Ga. at 741-42; (Pet. App. 3a-4a). In this regard, the Georgia Supreme Court recognized, that in granting summary judgment to Respondents:

> the trial court pointed to evidence in the record establishing that the one-landfill strategy [of the SWMP] was based in part on the costs associated with the siting, design, construction, operation, closure, and post-closure maintenance of the landfill; that

> those costs are interrelated with the costs of collection and waste reduction; that financing necessary to meet those costs is dependent on having a waste stream sufficient to generate the necessary revenue; and that development of an additional landfill in the county might render the existing landfill financially unable to continue operations. The trial court noted that the sustainability of a landfill is related to the protection, health, and safety of persons and furthers the purposes of the [Act], and that the financing of solid waste management was a factor included in Murray County's SWMP.

Id. The *Murray County II* Court added, "[o]ur review of the record shows the trial court was also correct in its holding that evidence of record supports the conclusions regarding the one-landfill strategy [set forth in the SWMP]." *Id.*, 282 Ga. at 742; (Pet. App. 4a). The *Murray County II* Court thus held that the trial court properly applied the applicable standard set forth in *Murray County I* with regard to state law SWMP consistency determinations. *Id.*

Finally, the *Murray County II* Court addressed Petitioner's argument that Respondents' "determination that R&J's proposed facility is inconsistent with the SWMP was based on economic protectionism." *Id.*, 282 Ga. at 742; (Pet. App. 5a). Citing to its earlier opinion in *Murray County I*, the Supreme Court of Georgia affirmed the trial court's rejection of Petitioner's argument "that construing the SWMP to exclude new landfills from Murray County constituted

economic protectionism violative of the Commerce Clause of the United States Constitution" on the grounds that there was no evidence to support such claim. *Id.*, 282 Ga. at 743; (Pet. App. 6a) (holding "[c]ontrary to R&J's arguments, there is no evidence of record suggesting that adoption of the one-landfill strategy was motivated by a desire to monopolize the waste management business"). Finding no error, the Supreme Court of Georgia thus affirmed. *Id.*, 282 Ga. at 743; (Pet. App. 7a).

REASONS FOR DENYING THE PETITION

Petitioner tries to inflate this fact-bound state law case into one presenting a conflict between the decision of the Supreme Court of Georgia in *Murray County II* and prior decisions of this Court bearing on issues of federal constitutional law. It is nothing of the sort. Rather, the instant case involves the exercise of discretion conferred by Georgia statute and regulations on local government for the planning, handling and disposal of solid waste, which is "'both typically and traditionally a local government function.'" *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, ___ U.S. ___, 127 S.Ct. 1786, 1796 (April 30, 2007) (quoting *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 264 (2d Cir. 2001)). As Petitioner raises no conflict between the decision below and any prior decision of this Court on an important federal question, the Petition should be denied.

I. The Facts of This Case Do Not Present the Issues Raised by Petitioner.

The grounds for the Petition largely arise from various disputes the Petitioner has with the factual findings of both the Supreme Court of Georgia in *Murray County II* and the Murray County Superior Court. (*Compare* Pet. 10 *with Murray County II*, Pet. App. 3a; Order, Pet. App. 15a).

A. No Written Verification of Consistency Was Ever Provided.

Contrary to Petitioner's assertion that "the County provided written verification to R&J that the Proposed Facility is consistent with the SWMP" (Pet. 10), both the Supreme Court of Georgia and the trial court made the opposite factual determination: that Petitioner was never issued the verification of consistency that it seeks. (Order, Pet. App. 15a ("On August 26, 2004, Greg Kirmamon [sic], attorney for Murray County, wrote Plaintiff to inform it that Defendants had determined that Plaintiff's proposed landfill was inconsistent with Murray County's SWMP and, as such, Murray County refused to issue the written verifications"); *Murray County II*, 282 Ga. at 741; (Pet. App. 2a-3a) ("The record shows, however, the purported verification was a letter which did not comply with the requirements for a letter of verification set forth in Georgia Department of Natural Resources Rule 391-3-4-.02(10).... Accordingly, R&J's argument on this issue, being without support in the record, has no merit")). Hence, Petitioner's

enumeration of error, arising under Georgia law, in support of its "vested right to a written verification" argument is meritless, *inter alia*, on the grounds that there is no record evidence that Petitioner ever obtained the asserted vested property right under Georgia law, as the Supreme Court of Georgia properly held in *Murray County II*. 282 Ga. at 741; (Pet. App. 3a).

B. Petitioner Has No Property Interest in the Subject Property.

Petitioner misstates the facts in regard to its various enumerations of error purportedly arising under the Due Process clause of the U.S. Constitution. First, the record evidence shows that Petitioner has never held title to the Subject Property and has never closed on a purchase of same. (R-1700-02; R-210-35; R-1695-99). Notably, the only record evidence of any property 'interest' held by Petitioner in regard to the Subject Property, which is an option to purchase same from its current owner, (R-1696-1703), shows that such option to purchase the Subject Property *expired* on October 1, 2007. (R-1697). Accordingly, as Petitioner cites no record evidence that it has *any* "protected property rights" in the Subject Property, Petitioner lacks standing to pursue its Due Process claims herein, and any enumeration of error otherwise flowing from the rights of a property owner (of which Petitioner has none) is not ripe for consideration by this Court.

C. The SWMP is Not an "Ordinance."

The challenged determination by Respondents, that Petitioner's proposed landfill is not consistent with the County's SWMP, is part of Georgia's comprehensive statutory scheme for solid waste planning, handling and disposal in Georgia. Each city and county is directed under the Act to develop or participate in a SWMP. O.C.G.A. § 12-8-31.1; *Murray County I*, 280 Ga. at 316 n.8; (App. 5). Once a SWMP is developed in accordance with the Act and the attendant state regulations and ultimately approved, "[t]hen when a new solid waste facility is proposed, the applicant must request written verification from the local government that the proposed facility is consistent with the SWMP." *Murray County I*, 280 Ga. at 316; (App. 5) (citing O.C.G.A. § 12-8-24(g)). Thus, the action challenged in this case is not a county ordinance, but a determination delegated by the Act to the County to determine whether the landfill proposed by Petitioner meets one of the prerequisites for a permit under State law – that any permitted landfill must be consistent with the local SWMP. The fatal flaw of Petitioner's due process argument in regard to its citation of this Court's prior cases involving the construction of ordinances is that it invites this Court to extend constitutional prohibitions relative to the validity of *ordinances* to the County's lawful exercise of *discretion* in making the determination required of it under O.C.G.A. § 12-8-24(g) and the applicable state regulations. Petitioner does not challenge the validity of the Act, or of the

applicable regulations. Instead, Petitioner variously asks this Court to decide that constitutional due process and the dormant Commerce Clause dictates the factual decision that the County must make under power properly delegated to it under valid State law. By doing so, Petitioner seeks to elevate that factual determination into a federal constitutional issue for this Court to decide. This Court, as did the Supreme Court of Georgia in *Murray County II*, should decline that invitation.

II. The Decision Below Does Not Conflict With any Decision of This Court.

The decision of the Supreme Court of Georgia in *Murray County II* does not conflict with any prior decision of this Court, nor does it implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried its burden of demonstrating any "compelling reasons" to grant the Petition. *See* SUP. CT. R. 10.

A. Petitioner Presents No Conflict Between the Decision Below and a Prior Decision of this Court In Regard to the Alleged Requirement for a Hearing Prior to SWMP Consistency Determinations Under Georgia State Law.

Petitioner first argues that "R&J's due process rights were violated when R&J was deprived of its property rights without a hearing." (Pet. 11). In

support of its argument, Petitioner cites to Georgia case law addressing the validity of ordinances. (Pet. 11-12). As these cases are inapposite, the Supreme Court of Georgia in the decision below properly rejected Petitioner's arguments. The Act, O.C.G.A. § 12-8-24(g), authorizes Respondents to determine whether a proposed solid waste facility is consistent with its SWMP, and the agency rules, Ga. Comp. R. & Regs. r. 110-4-3-.04(5)(d)(3)(ii) and (iii), provide *procedures* for the determination of SWMP consistency. *Murray County I*, 280 Ga. at 317; (App. 7). Neither the Act, nor the rules require a hearing prior to Respondents' determination of SWMP consistency. Rather, under the "comprehensive statutory and regulatory scheme," the county "is authorized to consider any relevant factor that it appropriately considered in the SWMP itself" in making its SWMP consistency determination under O.C.G.A. § 12-8-24(g). *Id.*, 280 Ga. at 317; (App. 7). While no state may "deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV § 1, the Georgia law standard for SWMP consistency determinations as articulated by the Supreme Court of Georgia, having nothing to do with creating or depriving property interests (of which Petitioner has none, R-210-35; R-1695-99; R-1696-1703), does not even implicate the Due Process clause.

The cases cited by Petitioner, involving the *validity* of statutes and ordinances, present no conflict between the decision of the Supreme Court of Georgia in *Murray County II* and any prior decision of

this Court. (Pet. 11-12). If Petitioner was genuinely concerned with a lack of a hearing as a part of SWMP consistency determinations under the comprehensive Georgia statutory and regulatory scheme, it would have challenged the constitutionality of the Act or the validity of the regulations on that basis. Petitioner has mounted no such constitutional attack on either the Act or state regulations, opting instead to petition this Court to grant certiorari in order for this Court to address what Petitioner alleges is a conflict between *Murray County II* and a 33-year-old decision by the Georgia Court of Appeals in *City of Hawkinsville v. D.T. Clark*, 135 Ga.App. 875, 219 S.E.2d 577, 579 (1975) involving constitutional due process in respect to the validity of ordinances. (*See* Pet. 12). There being no conflict between the decision below and a prior decision of *this* Court, the Petition should be denied.

B. No Unconstitutionally "Vague" or "Ambiguous" Ordinances Are At Issue.

In its second enumeration of error which purportedly implicates a federal question, Petitioner asserts that "R&J's due process rights were violated when R&J was deprived of its property rights by application of a vague and ambiguous ordinance." (Pet. 11). As an initial matter, as set forth above, the record evidence shows that Petitioner *has* no property rights, making the instant case a poor vehicle for determination of any issue involving rights of a

property owner arising under the U.S. Constitution. (*See* R-210-35; R-1695-99; R-1696-1703).

In regard to Petitioner's argument that "[t]he SWMP must provide 'sufficient standards' to control the discretion of the governing authority and provide adequate notice to applicants of the criteria for issuance of a permit," Petitioner cites to prior decisions of this Court addressing the constitutionality of statutes. (Pet. 15). The Petition makes no showing of how the decision below is in conflict with any of this Court's prior decisions in regard to due process. (*Compare Murray County II*, 282 Ga. at 740-41; (Pet. App. 2a) (explaining, "'in its determination of a proposed facility's consistency with its SWMP[,] . . . a local government is authorized to consider any relevant factor that it properly considered in developing its SWMP, as defined by the statutory and regulatory scheme.'") (citing *Murray County I*, 280 Ga. at 318; (App. 9)) *with Hill v. Colorado*, 530 U.S. 703, 708 (2000) (addressing challenge to Colorado state criminal statute under First Amendment); *Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984) (addressing challenge to Minnesota state statute under First and Fourteenth Amendments); *Grayned v. City of Rockford*, 408 U.S. 104, 107-08 (1972) (addressing challenge to city anti-noise ordinance under Equal Protection Clause and Due Process Clause of the Fourteenth Amendment); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (addressing Due Process challenge to city anti-vagrancy ordinance); *United States v. Nat'l Dairy*

Products Corp., 372 U.S. 29, 29 (1963) (addressing constitutional challenge to federal trade practices statute); *Boyce Motor Lines v. U.S.*, 342 U.S. 337, 340 (1952) (addressing constitutional challenge to federal interstate transportation regulation); *Connally v. General Const. Co.*, 269 U.S. 385, 388 (1926) (addressing constitutional challenge to Oklahoma state statute)).

In arguing that the "SWMP must provide 'sufficient standards' to control the discretion of the governing authority," Petitioner misstates the law through its citation to cases addressing the validity of statutes and ordinances. Murray County's SWMP is not a law. The applicable law is contained in the Act, and Respondents are charged under the Act with the responsibility to exercise their discretion in making the relevant SWMP consistency determination. As explained in *Murray County I*, "the plain language of OCGA § 12-8-24(g) . . . authorizes local governments to determine whether a proposed facility is consistent with its SWMP, but does not restrict the local government to consideration of only certain factors within its SWMP." *Murray County I*, 280 Ga. at 317; (App. 8). Indeed, it is the Act and the DCA Rules, not the county's SWMP, which provide the "standards" pertaining to the "discretion" which is to be exercised by Respondents in the exercise of the duty to determine SWMP consistency under O.C.G.A. § 12-8-24(g). *Murray County I*, 280 Ga. at 316, n.12 (App. 6) (explaining, "OCGA § 12-8-24(g) directs local governments to determine whether proposed facilities are

consistent with the SWMP, but contains no language indicating an intent to restrict that determination through the use of any particular factors."). Thus, the due process "concerns" raised by Petitioner, such as they are, are properly directed (if anywhere) toward the Act and the state regulations, not toward Respondents' valid exercise of discretion in determining SWMP consistency under Georgia state law, which the Supreme Court of Georgia recognized is properly delegated under Georgia law to the Respondents. Nowhere in this litigation, including in its Petition for Certiorari, has the Petitioner challenged the constitutionality of the Act or the state regulations.

C. Petitioner Presents No Conflict Between the Decision Below and a Prior Decision of this Court In Regard to the Commerce Clause.

In its final enumeration of error which purportedly implicates a federal question, Petitioner argues, under various theories, that the "County's interpretation of the SWMP is in violation of the Commerce Clause" because a SWMP consistency determination resulting in anything but the result it seeks variously "discriminates against non-County waste," "constitutes economic protectionism," "constitutes resource protectionism," allows for a "veto [of] importation of waste," or "imposes a burden on commerce that is clearly excessive in relation to putative local benefits." (*See* Pet. 20). As Petitioner fails to show how any of its arguments present an actual conflict between

Murray County II and any prior decision of this Court in regard to the Commerce Clause, the Petition should be denied.

i. Petitioner's Factual Dispute In Regard to Discrimination Against Non-County Waste Fails.

In support of its argument that Respondents' refusal to certify SWMP consistency amounts to a violation of the dormant Commerce Clause, Petitioner asserts, for the first time in the nearly three and a half year history of this case, that "host fees" are assessed on waste that is not generated within Murray County, but that such fees are not assessed on waste which is generated within the county. (Pet. 21, 25). Petitioner did not raise this contention before the Supreme Court of Georgia in the decision below or the trial court. Therefore, Petitioner has waived this argument. *See United States v. Bean*, 537 U.S. 71, 75 n.2 (2002) (holding argument was "waived" because it was "raised for the first time in his brief on the merits to this Court"). In any event, Petitioner misstates the facts in support of its "discrimination" argument, implying that because the relevant Sanitary Landfill Operation Agreement entered among Murray County and Santek Environmental of Georgia, LLC ("Santek") in regard to the County Landfill ("Agreement") provides for a "host fee" payable to Murray County by Santek, that such host fee is somehow paid by non-county residents (or by county residents for that matter) at a rate which is higher

than for waste which is generated within the county. There is no evidence of record to that effect, and Petitioner cites to none. Indeed, the Agreement cited by Petitioner only establishes that *Santek* – and no other entity or class of persons – pays a host fee to Murray County for waste generated outside of Murray County which is deposited at the County Landfill. (R-1772). Furthermore, there is no record evidence in support of Petitioner's factual argument that waste disposal costs for persons outside of Murray County are somehow increased due to a "lack of competition" or a "monopoly for waste in the region." (Pet. 21). Finally, Petitioner's unsupported factual dispute with the holdings of *Murray County II* and the trial court are belied by the record. As set forth by the factual findings of the Murray County Superior Court as affirmed in *Murray County II*, Respondents' SWMP consistency determination was based upon an overwhelming amount of undisputed evidence, including, *inter alia*, evidence of adverse environmental impacts from the Proposed Landfill, none of which were related to or could arguably suggest a preference for domestic interests at the expense of outsiders. *Murray County II*, 282 Ga. at 743; (Pet. App. 6a-7a); (Order, Pet. App. 31a). Having no support in the record, Petitioner's attempt to cast the Supreme Court of Georgia's opinion below as being in conflict with this Court's prior decisions through its "discrimination" argument is meritless.

ii. The Decision Below Is Entirely Consistent with *Carbone* and *United Haulers*.

Petitioner argues that Respondents' decision that the Proposed Landfill was not consistent with the SWMP was made solely on the basis of protectionist intent, an intent which was proscribed by this Court in the context of the validity of a local statute under the Commerce Clause. (*See* Pet. 21-24 (citing *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 386 (1994) (examining constitutionality of local ordinance requiring that solid waste processed or handled within town be processed or handled at town's transfer station)). As shown in this Court's recent opinion in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, even if Respondents' SWMP consistency determination had any effect on the affairs of those outside of Murray County, Respondents are authorized to ensure the financial viability of its waste management facilities, even where there is some impact on interstate commerce. ___ U.S. ___, 127 S.Ct. 1786 (April 30, 2007); *see also Daviess County, Kentucky v. Nat'l Solid Wastes Mgmt. Ass'n*, ___ U.S. ___, 127 S.Ct. 2294 (May 14, 2007) (mem.) (vacating the judgment of the United States Court of Appeals for the Sixth Circuit in *Nat'l Solid Wastes Mgmt. Ass'n v. Daviess County, Kentucky*, 434 F.3d 898 (6th Cir. 2005) *vacated*, ___ U.S. ___, 127 S.Ct. 2294 (2007) and remanding same to the Sixth Circuit for further consideration in light of this Court's opinion in *United Haulers*, ___ U.S.

___, 127 S.Ct. 1786). As the Supreme Court of Georgia held in *Murray County II*, the recent decision of this Court in *United Haulers* directly contradicts Petitioner's argument that Respondents' consideration of the long-term sustainability of the County Landfill as envisioned by the Respondents' SWMP in its consistency determination constituted economic protectionism and was therefore illegal, because, according to Petitioner, a local government cannot designate its landfill for the receipt of all solid waste within the county without running afoul of the dormant Commerce Clause of the U.S. Constitution. *Murray County II*, 282 Ga. at 743; (Pet. App. 6a).

In *United Haulers*, this Court addressed whether solid waste flow control ordinances enacted by the Oneida and Herkimer, New York counties violated the dormant Commerce Clause. ___ U.S. at ___, 127 S.Ct. at 1791-92. In addressing a growing solid waste management and disposal "crisis" within their borders, the counties adopted the subject flow control ordinances in order to ensure the financial viability of solid waste management facilities owned and operated by the counties' solid waste authority. *Id.* In holding that the counties' enactment of the subject ordinances did not constitute economic protectionism or discriminate against interstate commerce in violation of the Commerce Clause, this Court recognized that "[u]nlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens. These important responsibilities set state and local government apart from a

typical private business." ___ U.S. at ___, 127 S.Ct. at 1795. In holding that the counties' approach to ensuring the financial viability of their solid waste management and disposal scheme was proper under the Commerce Clause, this Court explained:

> Here the flow control ordinances enable the Counties to pursue particular policies with respect to the handling and treatment of waste generated in the Counties, while allocating the costs of those policies on citizens and businesses according to the volume of waste they generate. The contrary approach of treating public and private entities the same under the dormant Commerce Clause would lead to an **unprecedented** and **unbounded interference by the courts with state and local government.**

___ U.S. at ___, 127 S.Ct. at 1796 (emphasis supplied). This Court further cautioned:

> We should be **particularly hesitant to interfere with the Counties' efforts** under the guise of the Commerce Clause because **"[w]aste disposal is both typically and traditionally a local government function."** Congress itself has recognized **local government's vital role in waste management, making clear that "collection and disposal of solid wastes should continue to be primarily the function of** State, regional, and **local agencies."**

Id. (citations omitted) (emphasis supplied). This Court thus held "the Counties' flow control ordinances, which

treat in-state private business interests exactly the same as out-of-state ones, do not 'discriminate against interstate commerce' for purposes of the dormant Commerce Clause." *Id.* ___ U.S. at ___, 127 S.Ct. at 1797. Likewise, the comprehensive solid waste planning and handling scheme set forth by Georgia statute and implemented by Respondents in the actions challenged in the Petition address local conditions as described in the SWMP, and treat in-state private business interests exactly the same as out-of-state ones. There is no discrimination against interstate commerce, because the record shows that the County-owned landfill accepts out-of-county waste as well as in-county waste, (R-472; R-473), and there is no evidence of any discrimination between the two, price-wise or otherwise.

In *United Haulers*, this Court then turned to the test set forth in this Court's earlier opinion in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which is used to evaluate the constitutionality of a nondiscriminatory statute such as the one at issue in that case "'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Id.* Finding no evidence of record to demonstrate "*any* disparate impact" on out-of-state businesses, this Court concluded, "[w]e find it unnecessary to decide whether the ordinances impose any incidental burden on interstate commerce because any arguable burden does not exceed the public benefits of the ordinances." *Id.* (emphasis in original). As this Court explained in upholding the ordinances

benefiting the county owned and operated waste facilities, "[t]he ordinances give the Counties a convenient and effective way to **finance** their integrated package of waste-disposal services." *Id.* ___ U.S. at ___, 127 S.Ct. at 1798 (emphasis supplied).

The decision below in *Murray County II* is entirely consistent with this Court's prior decision in *United Haulers*. In the instant case, there is no record evidence of any "disparate impact" on out-of-state business. On the other hand, as recognized in *Murray County II* in affirming the trial court's factual findings in regard to benefits of ensuring the continued viability of the County Landfill, there is ample evidence of the public benefit of Respondents' consideration of those anticipated impacts in Respondents' SWMP consistency determination. *Murray County II*, 282 Ga. at 743; (Pet. 6a-7a). Such evidence, as recognized by the trial court and affirmed in *Murray County II*, includes, *inter alia*, protection of the environment and preservation of wetlands in the vicinity of the Proposed Landfill site and the continued viability of the County Landfill and collection and disposal capability with the planning area for the duration of the planning period in the SWMP. *See id.*; (Order, Pet. App. 27a-31a). Thus, this Court's recent decision in *United Haulers* shows, contrary to Petitioner's principal argument herein, that local government is authorized to take measures to ensure the financial viability of a local solid waste management facility – and the exercise of such authority by considering anticipated adverse impacts on government-owned

and/or operated waste facilities in SWMP consistency determinations neither constitutes "economic protectionism" nor offends the Commerce Clause. *See* ___ U.S. at ___, 127 S.Ct. at 1796-97.

Under *Carbone*, "[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose **object** is local economic protectionism . . . " *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. at 390 (emphasis supplied). In *Murray County II*, the Supreme Court of Georgia rejected Petitioner's argument that Respondents' SWMP consistency determination constituted "economic protectionism." 282 Ga. at 743; (Pet. App. 6a-7a).

Applying the *Murray County I* standard governing SWMP consistency determinations, the *Murray County II* Court recognized that this Court, in upholding a local law favoring government-owned waste facilities such as the Murray County-owned County Landfill at issue in the instant case, noted that "'laws favoring local government . . . may be directed toward any number of legitimate goals unrelated to economic protectionism.'" *Id.* (citing *United Haulers*, ___ U.S. at ___, 127 S.Ct. at 1786). Affirming the trial court's factual determinations, the *Murray County II* Court concluded:

> Here, the provision in the SWMP for a one-landfill strategy, though based on economic considerations, is established in the record as being directed toward legitimate goals **unrelated** to protectionism. Contrary to R&J's

> arguments, there is **no evidence of record** suggesting that adoption of the one-landfill strategy was motivated by a desire to monopolize the waste management business.
>
> The evidence of record supports Murray County's determination that R&J's proposed facility is inconsistent with the one-landfill strategy set out in the SWMP, and the factors leading to that determination were properly considered in the SWMP. Thus, the standard established in [*Murray County I*] was met with regard to that determination.

Murray County II, 282 Ga. at 743; (Pet. App. 6a-7a) (emphasis supplied). Accordingly, the Supreme Court of Georgia's opinion in *Murray County II*, is entirely consistent with this Court's prior decisions addressing application of the dormant Commerce Clause in the context of a local government's exercise of its duties in protecting the health, safety and welfare of its citizens in the arena of solid waste disposal.

iii. Petitioner's Factual Dispute In Regard to The Prospective Ability to "Veto Importation of Waste" Fails.

Petitioner's argument that Respondents' refusal to certify SWMP consistency allows the Respondents "to veto the importation of waste" (Pet. 29), is belied by the record, and the *Murray County II* Court properly rejected that argument. Respondents do not ban the "importation" of waste, as the County Landfill accepts waste without regard to origin, as Petitioner

has acknowledged in prior briefing. (R-472; R-473; R-1621). Indeed, an adequate waste stream to finance the costs of the County Landfill is a central component of the SWMP, and a principal reason why the Proposed Landfill is inconsistent with the SWMP, as recognized in *Murray County II*. 282 Ga. at 741; (Pet. App. 3a); (R-1253; R-1067-68; R-470, p. 18). Once again, Petitioner's citation to this Court's prior opinions in support of its argument seeks to extend constitutional prohibitions on *ordinances* themselves to the Respondents' lawful exercise of *discretion* under O.C.G.A. § 12-8-24(g) and state regulations governing solid waste, whose constitutionality remain unchallenged. *See Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Resources*, 504 U.S. 353, 359 (1992) (examining constitutionality of state law waste import restrictions). *Fort Gratiot* is inapposite, as *Murray County II* did not address the constitutionality of the Act, the state solid waste regulations (or the SWMP for that matter), or whether any of the foregoing favor domestic interests at the expense of outsiders. *Murray County II*, 282 Ga. at 741; (Pet. App. 2a). Petitioner does not allege that the Act or Georgia state regulations are unconstitutional. Rather, Petitioner challenges the Respondents' exercise of the discretion conferred on local government under those laws in the determination of SWMP consistency. *Id.*

iv. Petitioner's Impermissible "Burden" on Interstate Commerce and "Resource Protectionism" Arguments Fail.

Petitioner variously argues that consideration of financial factors by Respondents in refusing to certify SWMP consistency results in an impermissible "burden" on interstate commerce in violation of the Commerce Clause, and that its determination evidences an attempt to "give extra-territorial effect to the SWMP" by virtue of its Agreement with Santek for operation of the County Landfill. (Pet. 24-25; 30-31). Contrary to Petitioner's factual arguments which were rejected in both courts below, the record evidence shows that interstate commerce was not burdened, but actually benefited. Petitioner's complaint is that the County's SWMP allows the disposal of waste within the County, including out-of-county waste, at only one landfill, the County Landfill. Petitioner's complaint therefore is not with any discrimination against interstate commerce, but with the refusal to allow Petitioner to build another landfill to receive waste in the County. The claim, therefore, is in reality a claim that an exclusive franchise for the receipt of waste was conferred on the County-owned landfill, operated by Santek. Petitioner's claim, therefore, is precisely the same claim rejected by this Court in *United Haulers*, *supra*.

In addition, the operator of the County landfill here is Santek, an out-of-state company, and it is undisputed that Santek was chosen to operate the

County landfill in a fair and open bid process, in which requests for proposals were sent to both in-state and out-of-state companies. (R-2146-47 ¶¶ 3-9; R-1730-32; R-1736-50). Accordingly, there is no violation of the Commerce Clause. *United Haulers*, ___ U.S. at ___, 127 S.Ct. at 1797 ("We hold that the Counties' flow control ordinances, which treat in-state private business interests exactly the same as out-of-state ones, do not 'discriminate against interstate commerce' for purposes of the dormant Commerce Clause."); *see also Southern Waste Systems, LLC v. City of Delray Beach Fla.*, 420 F.3d 1288, 1291-92 (11th Cir. 2005) (upholding local restrictions on solid waste handling and award of exclusive waste hauling contract, where restrictions were the result of open and competitive bid process available to in-state and out-of-state competitors whose solid waste landfill franchise was a result of an open bidding process). Thus, just as in *Southern Waste*, the Respondents' solid waste landfill franchise was not only open to out-of-state competitors as a result of an open bidding process, but it was, in fact, awarded to one. *See id.*, 420 F.3d at 1291; (R-1730-32; R-1736-50; R-2146-47, ¶¶ 3-9). Indeed, there is no logical reason why conferring the exclusive right to *dispose* waste within Murray County should be treated any differently under the Commerce Clause than conferring the exclusive right to *collect and transport* waste which was upheld by the Eleventh Circuit in *Southern Waste*, which is itself consistent with this Court's opinion in *United Haulers*, ___ U.S. at ___, 127 S.Ct. at 1797. Petitioner cites no cases in support of its

claim that the two sets of activities ought to be treated differently. (Pet. 30-31). The question under the Commerce Clause is determined by whether the challenged action discriminates against interstate commerce by benefiting local economic interests while burdening those of outsiders. *E.g., United Haulers*, ___ U.S. at ___, 127 S.Ct. at 1797. Where, as here and in *Southern Waste*, the activity (selection of an out-of-state company to operate the County Landfill) actually *assists* interstate commerce, the Supreme Court of Georgia's rejection of Petitioner's argument in regard to the Commerce Clause was proper, and Petitioner presents no conflict between *Murray County II* and any prior decision of this Court in regard to the Commerce Clause. *See, e.g., United Haulers*, ___ U.S. at ___, 127 S.Ct. at 1797.

Finally, aside from the considerations set forth above, the cases cited by Petitioner in support of its claim that Respondents' determination amounts to "resource protectionism" (Pet. 28-29) are inapposite, as they have nothing to do with Respondents' lawful exercise of the discretion conferred upon it by the Act and the DCA Rules, whose constitutionality is unchallenged. Rather, the cases cited by Petitioner each deal with the constitutionality of local *laws* in respect of solid waste under the Commerce Clause, not the lawful exercise of *discretion* under constitutionally valid state laws. *See Oregon Waste Systems, Inc. v. Dep't of Env'l Quality*, 511 U.S. 93, 93 (1994) (examining constitutionality of **state law** imposing surcharge on domestic disposal of solid waste, whose rates were

based upon domestic versus foreign origin of waste); *Philadelphia v. New Jersey*, 437 U.S. 617, 618 (1978) (examining constitutionality of **state law** excluding out-of-state waste from in-state landfills); *Environmental Waste Reductions, Inc. v. Reheis*, 887 F.Supp. 1534, 1565 n.9 (N.D. Ga. 1995) (challenging constitutionality of **state law** requirements regarding facilities which will handle waste from outside the state). Thus, Petitioner fails to establish how the Supreme Court of Georgia's opinion in *Murray County II* has decided any federal question of law in a way that conflicts with a prior decision of this Court.

III. Adopting Petitioner's Argument Would Not Change the Outcome of This Case.

Even if this Court were to grant the Petition and ultimately overturn its own decision in *United Haulers*, the outcome of this case would remain unchanged, as evidence of record separate and apart from consideration of anticipated financial impacts on the County Landfill, "standing alone, independently satisfie[d] 'any evidence' standard of review" in regard to Respondents' SWMP consistency determination. (Order, Pet. App. 31a).

In the opinion below, the Supreme Court of Georgia affirmed the trial court's factual determination that there was ample support in the record substantiating Respondents' determination of SWMP inconsistency. *Murray County II*, 282 Ga. at 743; (Pet. App. 6a-7a). In doing so, the *Murray County II* Court

noted, with respect to its approval of Respondents' consideration of the "one-landfill strategy" in its SWMP consistency determination, "[s]ince that one determination establishes the inconsistency of the proposed facility with Murray County's SWMP, we need not consider the correctness of the others [sic] bases for the determination of inconsistency." *Id.*, 282 Ga. at 743 n.4; (Pet. App. 7a). As shown above, however, the trial court made a factual determination that there existed abundant evidence of record to support Respondents' determination of inconsistency, none of which involved economic considerations or anticipated impact on the County Landfill. Such evidence which was considered by Respondents, as recognized by the trial court, consisted of negative land use effects of the Proposed Landfill, such as increased traffic and use of major transportation corridors of itself, and relative to both current solid waste management facilities and the collection and disposal capability within the planning area (Pet. App. 30a; R-2264; R-1562, pp. 147-48; R-1564, p. 156; R-1248) and adverse environmental impacts, including the filling of wetlands (Pet. App. 30a-31a; R-1248; R-1561, p. 143), all of which independently supported Respondents' determination that the Proposed Landfill was inconsistent with the county's SWMP. (Pet. App. 30a-31a). Thus, even if this Court were to instruct the Supreme Court of Georgia that Respondents may not consider the continued viability of the County Landfill in its SWMP consistency determinations under Georgia law, the outcome of this case would ultimately remain unchanged, as the trial

court, affirmed in *Murray County II*, made a factual determination that evidence other than financial considerations and anticipated impacts on the County Landfill independently satisfied the "any evidence" standard of review under state law. *Murray County II*, 282 Ga. at 743; (Pet. App. 31a). The Petition should be denied for this additional reason.

IV. Adopting Petitioner's Argument Would Result In Broad, Adverse Consequences for State and Local Government In the Arena of Solid Waste Management.

Without challenging the validity of the Act or state solid waste regulations, Petitioner mounts a collateral attack on Respondents' exercise of discretion under those laws in the exercise of its police powers, by seeking a ruling by this Court which would drastically and adversely impact the settled expectations of state and local government under this Court's prior decisions. As this Court recently explained in the context of its review of local action in the arena of solid waste, "[t]he dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake . . . " *United Haulers*, ___ U.S. ___, 127 S.Ct. at 1796. Adopting Petitioner's arguments would mark an unprecedented intrusion by the federal courts in the arena of waste disposal, not only challenging the validity of state laws which place the responsibility for solid waste planning and consistency determinations on local government, but

by mandating the very result of the exercise of that responsibility. Indeed, were this Court to approve the argument suggested by Petitioner, the participation by local government in planning for solid waste in their jurisdiction to protect the interests of its citizens and to safeguard the quality of the environment would be completely preempted by the dormant Commerce Clause, as any action resulting in barring the operation of a landfill within a local government's borders would run afoul of the Constitution. It is manifest from this Court's prior decisions that no such unprecedented intrusion is contemplated in the U.S. Constitution.

CONCLUSION

Accordingly, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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APPENDIX A

Supreme Court of Georgia

No. S05A1950.

[Decided March 13, 2006.]

MURRAY COUNTY, GEORGIA, et al.)
)
v.)
)
R & J MURRAY, LLC.)

SEARS, Chief Justice.

The Murray County Superior Court granted R & J Murray, LLC ("R & J") a writ of mandamus compelling Murray County (the "County") to verify to the Georgia Environmental Protection Division ("EPD") that R & J's proposed landfill was consistent with the County's Solid Waste Management Plan ("SWMP"). The County appeals. Because the County did not abuse its discretion by considering factors other than land use and environmental factors to determine that the proposed landfill was inconsistent with its SWMP, the trial court improperly granted summary judgment and a writ of mandamus to R & J. Accordingly, we reverse and remand.

In 2002, R & J first proposed building a Construction and Demolition ("C & D") landfill on 398 acres it owned in Murray County. Under OCGA § 12-8-24(g), before R & J could obtain a permit to build and operate a landfill from the EPD, it first had to obtain written verification from the County that its

proposed landfill did not violate any zoning or land use ordinances and was consistent with the County's SWMP.[1] The County responded to R & J's initial proposal, by letter, stating that the proposed C & D landfill, which would be restricted to the disposal of construction and demolition waste, was consistent with its zoning ordinances and its SWMP. R & J amended its request multiple times, however, and eventually asked the County to verify that an unrestricted Municipal Solid Waste ("MSW") landfill was also consistent with the County's SWMP.

The County refused to verify that the proposed MSW landfill was consistent with its SWMP, claiming that an unrestricted MSW landfill would cause more environmental harm than the originally proposed C & D landfill, and that the proposed landfill, owing to economic factors as well as its geographic proximity to the County's existing landfill, would render the County unable to continue operating its existing landfill. Due to land and geological limitations, the County's SWMP states that the County will rely exclusively on its existing MSW landfill until at least 2030. The County found that the proposed landfill would interfere with the expansion of the existing landfill necessary to achieve that goal, due to statutory restrictions on landfill density.[2] In addition, the County concluded that the proposed landfill

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[1] *Enre Corp. v. Wheeler County*, 274 Ga. 17, 549 S.E.2d 67 (2001).

[2] OCGA § 12-8-25.4.

would render the County financially unable to continue operating its existing landfill, contrary to the SWMP, and that by increasing the waste stream into the County, the County would be unable to meet its waste reduction goals.[3] The County thus concluded that the proposed MSW landfill was inconsistent with its SWMP, and it refused to issue the requested verification to the EPD. R & J then filed suit in the Superior Court, seeking a writ of mandamus to compel the County to issue the required verification to the EPD.

The trial court found that in making its decision, the County had considered factors that it was prohibited from considering under *Butts County v. Pine Ridge Recycling*[4] In that decision, the Court of Appeals ruled that under OCGA § 12-8-31.1(b), a local government can only consider environmental and land use factors in making its determination regarding a proposed landfill's consistency with its SWMP.[5] After eliminating the purportedly improper factors from consideration, such as the County's waste reduction goals, the trial court in this case concluded that the environmental and land use factors cited by the County did not justify its decision. Accordingly, the

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[3] The County also found that the unrestricted MSW landfill would create numerous negative environmental effects, including the spread of foul odors from trucks transporting sewage sludge through the most populated portions of the County.

[4] 213 Ga.App. 510, 445 S.E.2d 294 (1994).

[5] *Id.* at 512, 445 S.E.2d 294.

trial court found that the County's decision constituted an abuse of discretion, and granted a writ of mandamus compelling the County to issue the requested verification.[6]

Because we find that the comprehensive statutory and regulatory scheme applicable to landfill applications and SWMP development does not evidence an intent to so restrict local governments in their decision-making, we hereby overrule the decision in *Butts County*. An examination of the applicable statutes and regulations clearly reveals that local governments are authorized, and indeed required, to consider factors other than environmental and land use factors in developing a SWMP. In the absence of legislative restrictions on local governments' consistency decisions, then, we find that a local government is authorized to consider any relevant factor in determining whether a proposed facility is consistent with its SWMP that it properly considered in the SWMP itself.

In 1990, the General Assembly passed the Georgia Comprehensive Solid Waste Management Act ("Act") in order to:

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[6] "Mandamus is an extraordinary remedy and is available against a public official only when the petitioner shows a clear legal right to the relief sought or a gross abuse of discretion." *Mid-Georgia Environmental Mgmt. Group v. Meriwether County*, 277 Ga. 670, 672-673, 594 S.E.2d 344 (2004).

> protect the health, safety, and well-being of its citizens and to protect and enhance the quality of its environment, to institute and maintain a comprehensive state-wide program for solid waste management . . . so as to assure that solid waste does not adversely affect the health, safety, and well-being of the public and that solid waste facilities, whether publicly or privately owned, do not degrade the quality of the environment by reason of their location, design, method of operation, or other means and which, to the extent feasible and practical, makes maximum utilization of the resources contained in solid waste.[7]

An important part of the statutory scheme is the requirement that each city and county develop or participate in a SWMP.[8] Then, when a new solid waste facility is proposed, the applicant must request written verification from the local government that the proposed facility is consistent with the SWMP.[9] After receiving written verification from the local government, the applicant may then request a permit from the director of the EPD.[10]

The *Butts County* decision, as well as the decision by the trial court in this case, is based on the language

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[7] OCGA § 12-8-21(a).

[8] OCGA § 12-8-31.1.

[9] OCGA § 12-8-24(g).

[10] OCGA § 12-8-24(a).

of OCGA § 12-8-31.1(b). That statute directs each city and county to develop a SWMP, and declares that "at a minimum," every SWMP shall, (1) "provide for the assurance of adequate solid waste handling capability and capacity within the planning area for at least ten years . . . ," (2) "enumerate the solid waste handling facilities as to size and type," and (3) "identify those sites which are not suitable for solid waste handling facilities based on environmental and land use factors."[11] The statute does not state that only environmental and land use factors may be addressed in the SWMP, nor does it address how local governments are to determine whether a proposed facility is consistent with its SWMP.[12] In fact, the plain language of the statute indicates that factors other than the "minimum" land use and environmental factors might be considered.

Although OCGA § 12-8-31.1(b) provides the "minimum" factors that must be considered in a SWMP, OCGA § 12-8-31.1(a) also requires a valid SWMP to "conform to the plan development procedures developed and promulgated by the Department of Community Affairs."[13] The regulations issued by

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[11] OCGA § 12-8-31.1(b).

[12] OCGA § 12-8-24(g) directs local governments to determine whether proposed facilities are consistent with the SWMP, but contains no language indicating an intent to restrict that determination through the use of any particular factors.

[13] The DCA regulations are used to determine the validity of a SWMP. Ga. Comp. R. & Regs. r. 110-4-3-.03(2)(f).

the DCA, which "shall be used to guide the preparation, development, and review of all local government solid waste management plans,"[14] make clear that a local government is not limited in its SWMP to consideration of environmental and land use factors. For example, the regulations require a valid SWMP to include a procedure for determining whether a proposed facility is consistent with the SWMP.[15] "At a minimum," and among other things, the procedure for determining consistency "shall address . . . (ii) the anticipated impact the proposed facility will have upon current solid waste management facilities, [and] (iii) the anticipated impact the proposed facility will have on collection and disposal capability within the planning area."[16]

The County in this case focused on precisely these factors, among others, when it determined that the proposed landfill would render the County unable to continue to operate the existing landfill, as envisioned by its SWMP. If the *Butts County* decision

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[14] Ga. Comp. R. & Regs. r. 110-4-3-.01(2)(c).

[15] The regulations also impose upon the local government the duty to "[t]ake all action necessary or desirable to implement the approved and adopted comprehensive solid waste management plan." Ga. Comp. R. & Regs. r. 110-4-3-.03(4)(c).

[16] Ga. Comp. R. & Regs. r. 110-4-3-.04(5)(d)(3). A valid SWMP must also "address the following five core planning elements . . . waste disposal stream analysis, waste reduction, collection, and disposal, land limitation, education and public involvement, and an implementation schedule." Ga. Comp. R. & Regs. r. 110-4-3-.04(2)(a).

were correct, and OCGA § 12-8-31.1(b) limited the factors that could be considered in a consistency determination, then these regulatory requirements are meaningless.

The applicable statutes and regulations clearly show that local governments are authorized to consider factors other than environmental and land use factors in developing a SWMP. The plain language of OCGA § 12-8-24(g) then authorizes local governments to determine whether a proposed facility is consistent with its SWMP, but does not restrict the local government to consideration of only certain factors within its SWMP. It would be wrong to conclude, absent specific restrictions, that the legislature intended local governments to consider a variety of factors in developing its SWMP, but intended to allow local governments to consider only two limited factors in determining whether a proposed facility was consistent with that SWMP. The General Assembly plainly chose not to impose such restrictions on local governments in their consistency determinations. Thus, in determining whether a proposed facility is consistent with its SWMP, a local government is authorized to consider any relevant factor that it appropriately considered in the SWMP itself.

We do note, however, that local governments are not authorized to consider factors that do not promote the "health, safety, and well-being" of their citizens, protect the quality of the environment, or otherwise further the purposes of the Georgia Comprehensive Solid Waste Management Act. For example, nothing

in the regulatory or statutory scheme authorizes local governments to develop a SWMP or deny certification for a proposed facility based on the desire by the local government to monopolize the waste management business. Because that kind of bare economic protectionism does not further the goals of the Act, it is not a proper basis for denying certification or developing a SWMP. R & J argues that the County denied its certification in this case solely for this reason, but the trial court has never made that factual determination, and it would be improper for this Court to do so on appeal.

The *Butts County* decision improperly restricts a local government to consideration of only environmental and land use factors in its determination of a proposed facility's consistency with its SWMP. Instead, a local government is authorized to consider any relevant factor that it properly considered in developing its SWMP, as defined by the statutory and regulatory scheme. Because the trial court's determination that the County abused its discretion was based on its finding that the County considered factors it was prohibited from considering under *Butts County*, we reverse and remand for proceedings consistent with this opinion.

Judgment reversed.

All the Justices concur.

HUNSTEIN, Presiding Justice, concurring.

I agree with the majority opinion that under the facts in this appeal the County was not restricted in its decision-making authority to consideration of land use and environmental factors. I write separately, however, to emphasize two points. First, the County's authority to consider other relevant factors in reviewing plan consistency emanates from the absence of any restrictive language or procedure in its 2002 SWMP, a plan which is inconsistent with current DCA Minimum Planning Standards and Procedures. DCA Rule 110-4-3-04(5)(d)(3), effective January 1, 2004, requires a SWMP to specify a procedure the local government(s) will follow to determine if a proposed facility, public or private, is consistent with the plan. At a minimum, the procedure shall address

> (i) how the public will be involved and notified;
>
> (ii) the anticipated impact the proposed facility will have upon current solid waste management facilities;
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> (iii) the anticipated impact the proposed facility will have upon adequate collection and disposal capability within the planning area; and
>
> (iv) the effect the facility will have upon waste generated within the state achieving the States 25% per capita waste disposal reduction goal.

Minimum Planning Standards and Procedures, Ga. Comp. R. & Regs. r. 110-4-3-04(5)(d)(3). While the absence of such a procedure in the County's 2002 SWMP demonstrates its inconsistency with current regulations, at the time the County's plan was approved such a procedure was not required under DCA regulations. Appellants have not challenged the validity of the County's SWMP or its seemingly unfettered discretion to determine whether a proposed solid waste facility is consistent with the plan. Accordingly, those issues are not before us in this appeal.

Second, I agree with the majority opinion that the *Butts County* decision must be overruled. In that case, the Court of Appeals applied OCGA § 12-8-31.1(b), a statute requiring that a plan "identify those sites which are not suitable for solid waste handling facilities based on environmental and land use factors," and concluded that Butts County was restricted to consideration of environmental and land use factors in determining whether a proposed facility was consistent with the county's solid waste management plan. *Butts County v. Pine Ridge Recycling*, 213 Ga.App. 510, 512, 445 S.E.2d 294 (1994). Although the factors in OCGA § 12-8-31.1(b) are applicable with regard to the issue of site suitability, the issue before the Court of Appeals in *Butts County* was whether the proposed facility was consistent with Butts County's SWMP. The Court of Appeals confused site suitability with plan consistency, which require separate determinations under the Solid

Waste Management Act and related Minimum Standards and Procedures for Solid Waste Management Regulations promulgated by the DCA. *See* OCGA § 12-8-24(g) (requiring verification that proposed facility complies with local zoning and land use ordinance and is consistent with applicable solid waste management plan before issuance of permit); OCGA § 12-8-31.1(b) (plan shall identify those sites that are not suitable for solid waste handling facilities); Minimum Planning Standards and Procedures, Ga. Comp. R. & Regs. r. 110-4-3-.04(5)(d)(1) ("Land Limitation Element," requiring plan to include assessment and map identifying areas which, due to environmental limitations or land use factors are unsuitable for solid waste disposal facilities); *id.* at (5)(d)(3) ("Plan Consistency," requiring plan to include procedure for determining consistency with plan). In this case, the County correctly recognized the separate determinations and issued letters to appellees stating that the proposed facility constituted an "allowable use on the subject property," i.e., was suitable for the selected site, but denied that the proposed landfill is consistent with the County's SWMP.

APPENDIX B

Official Code of Georgia Annotated § 12-8-25.4(b)(2)

Limitations upon number of solid waste facilities which may be permitted within any given area

* * *

(b) No permit shall be issued under Code Section 12-8-24 for any solid waste handling facility other than a material recovery facility or compost facility or for any solid waste disposal facility other than a private industry solid waste disposal facility if any part of the premises proposed for permitting would lie within any geographic area which can be shown to meet the following criteria:

* * *

(2) The circular geographic area already includes all or a portion of three or more landfills within that portion of its territory which is within this state (including the landfill proposed for permitting in the case of a proposed expansion).

APPENDIX C

The Official Code of Georgia Annotated § 12-8-31.1

Local solid waste management plans

(a) Each city and county in Georgia shall develop or be included in a comprehensive solid waste management plan not later than July 1, 1993. Said plan may be developed independently as a local plan or jointly with other jurisdictions as a multijurisdictional or regional solid waste plan and shall conform to the plan development procedures developed and promulgated by the Department of Community Affairs under the provisions of Chapter 13 of Title 50.

(b) The local, multijurisdictional, or regional solid waste plan shall, at a minimum, provide for the assurance of adequate solid waste handling capability and capacity within the planning area for at least ten years from the date of completion of the plan which shall specifically include an adequate collection and disposal capability; shall enumerate the solid waste handling facilities as to size and type; and shall identify those sites which are not suitable for solid waste handling facilities based on environmental and land use factors.

(c) The review process for local, multijurisdictional, and regional solid waste management plans shall be in such form as developed and promulgated by the Department of Community Affairs under the provisions of Chapter 13 of Title 50. The regional development center for each geographical location in

which a local, multijurisdictional, or regional plan applies shall confirm that the local, multijurisdictional, or regional plan is consistent with the state solid waste management plan.

* * *

(e) After July 1, 1992, no permit, grant, or loan shall be issued for any municipal solid waste disposal facility or any solid waste handling equipment or recycling equipment used in conjunction therewith in a county or region which is not consistent with a local, multijurisdictional, or regional solid waste management plan.

APPENDIX D

Rules of Georgia Department of Community Affairs Ga. Comp. R. and Regs. r. 110-4-3-.03(4)(c)

(4) Local Governments: It is the responsibility of municipal and county governments in the State of Georgia to serve the public needs by promoting, establishing and implementing sound comprehensive solid waste planning. Accordingly, the governing body of municipalities and counties shall have the authority and responsibility to:

* * *

(c) Take all action necessary or desirable to implement the approved and adopted comprehensive solid waste management plan.

APPENDIX E

Rules of Georgia Department of Community Affairs Ga. Comp. R. and Regs. r. 110-4-3-.04(5)(d)(3)

3. Plan Consistency: In order for EPD to issue or renew a permit for a solid waste handling facility the facility or facility expansion must be consistent with a local government solid waste management plan. The plan shall specify a procedure the local government(s) will follow to determine if a proposed facility, public or private, is consistent with the plan. At a minimum, the procedure shall address

* * *

(ii) the anticipated impact the proposed facility will have upon current solid waste management facilities;

(iii) the anticipated impact the proposed facility will have upon adequate collection and disposal capability within the planning area; . . .

APPENDIX F

Georgia Department of Natural Resources
Ga. Comp. R. and Regs. r. 391-3-4-.02(10)

(10) Except for Private Industry Solid Waste Disposal Facilities, after July 1, 1992, each applicant for a permit shall provide written verification that the facility is consistent with the local or regional solid waste management plans that the host jurisdiction generating solid waste destined to the facility can demonstrate that they are actively involved in and have a strategy for meeting the State-wide goal of waste reduction by July 1, 1996. The verification shall consist of letters from the host jurisdiction and generating jurisdictions verifying consistency with the approved local solid waste plans.